92-765

No. 92-571

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PAINEWEBBER INCORPORATED,
Petitioner

v.

BANKATLANTIC,
Respondent

Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should exercise its power of supervision to review this extreme case of intentionally orchestrated attorney and juror misconduct which resulted in a grossly unfair trial in a federal district court and which was allowed to stand, at least in part, because of a failure to apply the express provisions of Rule 606(b), Federal Rules of Evidence.

PARTIES TO THE PROCEEDING

Cross-petitioner and respondent is BankAtlantic Savings Bank, a Federal Savings Bank, f/k/a Atlantic Federal Savings and Loan Association ("BankAtlantic").

Cross-respondent and petitioner is PaineWebber, Incorporated, f/k/a Blyth Eastman Paine Webber Incorporated ("PaineWebber").

DESIGNATION OF CORPORATE RELATIONSHIPS

Respondent's parent corporation is BFC Financial Corporation, f/k/a BankAtlantic Financial Corporation, f/k/a I.R.E. Financial Corporation. The entities affiliated with the parent are:

2000 South Dixie Corp.
B. & N. General Corp.
B.K. General Corporation
B.K.S. General Corporation
B.W. General Corporation
Chicago Heights General Corp.
Eden Services, Inc.
Eden United, Inc.
First Pensacola Mortgage Company, Inc.
Florida Partners Corporation
H.D. General Corporation
H.K. General Corporation
I.R.E. Advisors, Corp.
I.R.E. Advisors Series 21, Corp
I.R.E. Advisors Series 23, Corp.
I.R.E. Advisors Series 24, Corp.
I.R.E. Advisors Series 25, Corp.
I.R.E. Advisors Series 26, Corp.
I.R.E. Advisors Series 27, Corp.
I.R.E. Advisors Series 28, Corp.
I.R.E. Advisors Series 29, Corp.
I.R.E. BMOC, Inc.
I.R.E. Commercial Properties, Inc.
I.R.E. Computer Resources, Inc.

I.R.E. Condominium Management, Inc.
I.R.E. Energy 1981, Inc.
I.R.E. First Florida, Inc.
I.R.E. Growth Fund, Ltd.—Series 29
I.R.E. Income Advisors Corp.
I.R.E. Investments, Inc.
I.R.E. Konica, Inc.
I.R.E. Leasing, Inc.
I.R.E. Lennar, Inc.
I.R.E. North River, Inc.
I.R.E. Pension Advisors Corp.
I.R.E. Pension Advisors—II Corp.
I.R.E. Pension Investors, Ltd.
I.R.E. Pension Investors, Ltd.—II
I.R.E. Pinebrook, Inc.
I.R.E. Professional, Inc.
I.R.E. Properties, Inc
I.R.E. Property Analysts, Inc.
I.R.E. Property Management, Inc.
I.R.E. Real Estate Corporation (THE)
I.R.E. Real Estate Fund, Ltd.—Series 21
I.R.E. Real Estate Fund, Ltd.—Series 23
I.R.E. Real Estate Fund, Ltd.—Series 24
I.R.E. Real Estate Fund, Ltd.—Series 25
I.R.E. Real Estate Fund, Ltd.—Series 26
I.R.E. Real Estate Fund, Ltd.—Series 27
I.R.E. Real Estate Funds, Inc.
I.R.E. Real Estate Growth Fund, Ltd.—Series 28
I.R.E. Real Estate Income Fund, Ltd.
I.R.E. Real Estate Investment, Series 2, Inc.
I.R.E. Real Estate Investments, Inc.
I.R.E. Realty Advisory Group, Inc.
I.R.E. Shopping Center Development
I.R.E. Texas, Inc.
I.R.E. Wren Park, Inc.
Investors Sheltered Securities, Inc.
N.C. & G. General Corporation
North Miami General Corp.

Pengro Associates, Inc.
Professional Data Corporation
Realty 2000 Corporation
Rushmore Realty, Inc.
S & P General Corp.
S.T. General Corporation
Saxon S.L. General Corporation
Saxon S.W. General Corporation
Southern National General Corporation
Tanglewood College Station, Inc.
Tigertail General Corporation
Toy Associates, Inc.
Toy General Corporation
Travis House Apartments, Inc.
U.S. Capital Corp.
U.S. Capital Securities, Inc.
W.P. General Corporation
Z.W. General Corp.

Entities affiliated with the respondent are:

Atlantic Investment 68 Avenue Corp.
Atlantic Investment Broward Boulevard Corporation
Atlantic Investment Clifton Corp.
Atlantic Investment Commercial, Inc.
Atlantic Investment Cypress Lane Corp.
Atlantic Investment Jacaranda Corp.
Atlantic Investment Pelican Point Corp.
Atlantic Investment Pines Point Corporation
Atlantic Investment Taft Street Corp.
BankAtlantic Development Corporation
BankAtlantic Leasing
Fidelity Service Corporation
Hammock Homes, Incorporated
Heartwood 1, Inc.
Heartwood 2, Inc.
Heartwood 3, Inc.
Heartwood 4, Inc.
Heartwood 5, Inc.
Heartwood 6, Inc.

Heartwood 7, Inc.
Heartwood 8, Inc.
Heartwood 9, Inc.
Heartwood 10, Inc.
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Heartwood 12, Inc.
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Heartwood 15, Inc.
Heartwood 16, Inc.
Heartwood 17, Inc.
Heartwood 18, Inc.
Heartwood 19, Inc.
Heartwood 20, Inc.
Heartwood 87 Incorporated
Heartwood 88 Incorporated
Heartwood 90 Incorporated
Heartwood 91 Incorporated
Heartwood 91-1 Incorporated
Heartwood 91-2 Incorporated
Heartwood 91-3 Incorporated
Heartwood 91-4 Incorporated
Heartwood-Promenade Incorporated
Professional Valuation Services, Inc.

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CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-petitioner BankAtlantic requests that a writ of certiorari be granted to review the decision of the United States Court of Appeals for the Eleventh Circuit dated March 23, 1992, affirming a district court judgment based upon a jury verdict in favor of PaineWebber. A-3, App. E.* This cross-petition presents an extreme case of intentionally orchestrated attorney and juror misconduct calling for an exercise of this Court's power of supervision.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 955 F.2d 1467 (11th Cir. 1992) and is included in Paine-

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* References to "A-—" are to the Petitioner, Paine Webber's, appendix. References to "App. ——" are to Cross-Petitioner, BankAtlantic's, appendices.

Webber's appendix at A-3. The Eleventh Circuit's denial of rehearing on July 2, 1992, is included in PaineWebber's appendix at A-1.

The most relevant decisions of the district court are: (1) Memorandum order of July 10, 1989, on sanctions against PaineWebber and its counsel (App. A); (2) Memorandum order filed October 27, 1989, on admissibility at trial of personal financial information of BankAtlantic's chairman (App. B); (3) Final Judgment filed November 24, 1989 (App. E); (4) Omnibus order dated January 19, 1990, denying rehearing A-35-39); (5) Order filed March 8, 1990, setting an evidentiary hearing regarding juror misconduct (App. D); and (6) Order filed August 14, 1992, denying BankAtlantic's Motion for New Trial and Supplemental Motion for New Trial (App. C).

JURISDICTION

The decision of the Eleventh Circuit for which BankAtlantic seeks review was entered on March 23, 1992. A-3. Rehearing was denied on July 2, 1992. A-1. BankAtlantic relies upon Rule 12.3 of this Court for filing of its cross-petition.[1] BankAtlantic received PaineWebber's

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[1] BankAtlantic understands that its cross-petition will not be granted unless PaineWebber's petition is granted. Rule 13.5. Considering that PaineWebber's petition is frivolous, it appears unlikely that the cross-petition will be granted. Nonetheless, BankAtlantic recognizes that this Court has broad discretion when deciding which writs to accept and that it may even grant a petition for the purpose of affirming a specific decision of a circuit court.

Although BankAtlantic initially made a decision not to petition this Court, knowing that it is preoccupied with a wide range of highly charged social issues, BankAtlantic strongly believes that a gross miscarriage of justice occurred in this case. Both the district court and the Eleventh Circuit applied erroneous legal standards and demonstrated little concern about the egregious and intentionally orchestrated attorney and juror misconduct that deprived BankAtlantic of a fair trial in this case. It would be fitting if this Court relied on PaineWebber's own petition to accept jurisdiction and correct the wrong by ordering a new trial and reminding the lower federal courts that they must be vigilant to prevent misconduct such as PaineWebber's.

petition for writ of certiorari on October 2, 1992. This Court has jurisdiction to review the decision of the Eleventh Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Rule 606, Federal Rules of Evidence provides:

> **(b) Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

STATEMENT OF THE CASE

BankAtlantic sued PaineWebber for breach of fiduciary duty, fraud, and related tort claims.[2] A-85. The essence of those claims was that PaineWebber abused a fiduciary relationship with BankAtlantic by making a series of misrepresentations and omissions to induce BankAtlantic into two complex, financial transactions involving interest rate swaps. The PaineWebber employees who recommended the swaps had lied about their expertise on placing swaps in situations such as that encountered by BankAtlantic (admitting at trial that they had none) and had lied about the supposed benefits of the transactions.

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[2] There was also a distinct claim for breach of contract. That claim was discussed at length in BankAtlantic's Brief in Opposition to PaineWebber's petition.

In fact, the transactions made no sense for BankAtlantic looking at its business as a whole. In the end, the complicated transactions accomplished nothing more than causing BankAtlantic to wire transfer over a period of years of a total of $24 million in cash to another, and far more lucrative, client of PaineWebber: Homestead Savings of California. To assure that BankAtlantic would make those payments, the PaineWebber employees had concealed most of the information they had about their extensive and highly profitable relationship with Homestead, about the problems at Homestead, and about the huge risks of the transactions.

So significant was the relationship between PaineWebber and Homestead that during the discovery phase of this litigation, PaineWebber and its attorneys had intentionally defied discovery rules and had violated a district court discovery order by continuing to conceal from BankAtlantic information about Homestead. As the district judge stated in his lengthy "Memorandum Order" outlining the violations: "In short, [PaineWebber] did its utmost to keep [BankAtlantic] in the dark, and the truth hidden." *BankAtlantic v. Blyth Eastman Paine Webber, Inc.*, 127 F.R.D. 224, 233 (S.D. Fla. 1989). App. A.

Despite the sanction, PaineWebber did not change its behavior. PaineWebber approached the trial with exactly the same attitude it had during discovery, that is, with an intent to employ any necessary tactic to avoid paying BankAtlantic for the staggering damages (more than $30 million including interest) it had caused.

PaineWebber knew that the operative facts had been established in pretrial discovery, including post-sanction expedited discovery, and knew that those operative facts were essentially undisputed. The people at PaineWebber who sold BankAtlantic on these transactions made statements that were clearly false and had purposefully omitted to disclose facts which would have prevented the transaction from occurring. No one from PaineWebber

who participated in structuring the transactions could defend at trial what they had done. Their "expertise" was nonexistent and their breach of fiduciary duty obvious.

The passage of time had demonstrated that the very risks known to PaineWebber and concealed from BankAtlantic were both real and had occurred. The motive for PaineWebber's actions had become clear. BankAtlantic's losses were both measurable and large. The BankAtlantic officers who had been duped by PaineWebber had all left the institution. Some of PaineWebber's own employees had moved on and were not so constrained by "loyalty" to an employer.

The question for PaineWebber had become: What could it do at trial to win? The answer, we now know, was to launch an intense, vicious, and false personal attack on the new chairman of BankAtlantic, Alan Levan. The strategy was to obscure the complex financial transactions at issue in this case with an avalanche of largely irrelevant "facts" and to focus the attention of the jurors on a highly personal attack of the kind one might expect to find in the *National Inquirer*.

Although the district court's rulings would not permit an examination of the matter, it is believed that PaineWebber conducted a pretrial background investigation of the prospective jury pool, the names of which are provided to counsel in advance of trial upon request, to determine, among other things, if a personal attack might be effective. Among the first of the names on that list was Anthony Lippert, who, BankAtlantic later discovered, worked as a real estate salesman for a law school classmate of one of PaineWebber's trial counsel.

During voir dire, Lippert was asked his occupation. He responded: "Recently retired from AT&T." R44 at 35. Lippert completely failed to disclose that he was presently employed as a real estate salesman. When asked if he had any bad experiences he thought might affect his abil-

ity to be fair, Lippert volunteered: "I don't think it would affect my fairnes but I did have or my wife had an experience with one of the marginal stockbrokering companies that trade in penny stocks and they had a smooth talking salesman who persuaded her to make an investment and it turned out to be bad." *Id.* at 38. Despite this statement, Lippert still concealed that he was a salesman and, of course, his statement indicated a potential bias in favor of BankAtlantic.

Lippert was not struck from the jury panel. (BankAtlantic did strike another person from panel who admitted to being a real estate saleswoman.) Lippert was sworn in as a juror in this case. Indeed, Lippert ultimately became the jury foreman. The stage was set.

I. ATTORNEY MISCONDUCT: THE ATTACK ON BANKATLANTIC'S CHAIRMAN

Alan Levan knew very little about this case from his direct knowledge. He could only offer indirect hearsay or conclusory testimony. The swap transactions were initiated in 1984. Levan did not become chairman of BankAtlantic until 1987.[3]

Levan had no direct dealings with PaineWebber at any time. He took no part in the discussions involving the second swap (not being on the Executive Committee where all such discussions took place) and was not even a member of the board when the first swap was executed. Levan had no direct or indirect involvement with the

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[3] In late 1983, I.R.E. Financial Corporation, in which Levan had a controlling interest, became a ten percent shareholder of BankAtlantic. In April 1984, Levan was elected as a member of BankAtlantic's board. In February 1987, the Federal Home Loan Bank Board authorized I.R.E. to acquire a controlling interest in BankAtlantic. That same month, I.R.E. acquired the stock and Levan became chairman of BankAtlantic's board. By the time of trial in 1989, I.R.E. owned approximately 65% of BankAtlantic's common stock.

swaps or management of the swaps. R.63. That responsibility fell to others.

Nonetheless, PaineWebber featured Alan Levan at trial to make him synonymous with BankAtlantic in the minds of the jurors and then to vilify him. PaineWebber's attack was designed so that the jury would ask itself: "How can we possibly give that man $30 million?"

One major prong of the atack was to parade Levan's income before the jury. Like other senior executives of large companies, Levan is well compensated. His total income from all sources was $755,081 in 1986, $764,193 in 1987, $502,717 in 1988, and $919,921 in 1989, the year of the trial. R63 at 173-92. None of Levan's salary, however, came from BankAtlantic until after I.R.E. had been approved to acquire a controlling interest in the institution. No income was received by Levan from BankAtlantic until almost two years after the damage from the swaps had reached the maximum level, and almost four years after the swaps were placed. The portion of Levan's salary paid by BankAtlantic after 1987 did not exceed $260,000. *Id.*

To put evidence of Levan's income before the jury, PaineWebber called Levan as a witness in *its* case. For hours, Levan was questioned regarding a document prepared by BankAtlantic and its counsel in the latter part of 1983, before Levan had any interest in the institution. R63. Levan was then interrogated on other documents he had little or no role in preparing and on a host of other extraneous matters. *Id.* None of this interrogation involved Levan's knowledge of facts. R63.

After this meaningless, but lengthy, interrogation, PaineWebber asked Levan about his compensation. The district court overruled BankAtlantic's vehement objections to this line of questioning. The court later refused to allow BankAtlantic to bring before the jury all of the factors that bore on Levan's income, such as the fact that

he and his wife had been kidnapped in 1988 and held for ransom to be paid by BankAtlantic.

The prejudicial effect of the income information is obvious. The overwhelming public outcry when there is any effort to raise the salaries of public officials to even a fraction of the levels enjoyed in the private sector is well known to all.[4] Moreover, the salary levels of corporate executives, especially those in the savings and loan industry, had become very unpopular as financial institutions failed and the economy deteriorated.

PaineWebber's distorted use of the income testimony in closing argument was even more prejudicial. Counsel for PaineWebber placed his comments about Levan's income in the context of the board's removal of the former president and then asserted: "From there on . . . Mr. Levan starts getting $1 million a year." R66-129.

Not only was this and other similar assertions inflammatory and prejudicial, it was completely false and totally irrelevant to the proceedings. Levan was never paid more than $260,000 from BankAtlantic, he had no personal knowledge of the facts of the case, and he was called to the stand by PaineWebber solely to elicit his income and to vilify him. The prejudice to BankAtlantic was made all the more striking because the judge sustained PaineWebber's refusal to divulge the income of its employees who were involved with the swaps.

In another prong of its personal attack on Levan, counsel for PaineWebber repeatedly referred to Levan as a "corporate raider." In closing, counsel for PaineWebber told the jury: "Corporate raider. What we know is they

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[4] One of the many ironies in this case was that shortly after the case was finally resolved in the district court, the trial judge resigned from the bench because of the level of pay of a federal judge and wrote for *The Miami Herald* a lengthy article discussing the failure of the public to establish appropriate levels of compensation for judicial officers.

go into a company. They take control. They take over. They sell off the assets like those 14 percent mortgages, pull the income out and leave the carcass."[5] R66-127. BankAtlantic's objection to this outrageous argument in closing was met with the district court's ruling: "Overruled: jury question." *Id.* So the argument was both permitted and underscored by the court.

The argument of PaineWebber's counsel was completely unfounded in fact. Mr. Levan had never before taken control of a company. He had, over a period of 20 years, steadily built from scratch his I.R.E. family of companies, which counsel for PaineWebber told the jury in a derogatory manner was a "spider web" with all the money leading to Levan's pocket. R63-213-216, R66-129. In fact, it was the lead company of that group of public and private companies, I.R.E. Financial (traded on the American Stock Exchange) that acquired control of BankAtlantic, not Levan personally. Moreover, the 14% mortgage assets were not sold off to leave a "carcass," as stated by counsel for PaineWebber. Although a few were sold, almost all of them were prepaid by the homeowners who refinanced when interest rates dropped. R55-56-76.

Another prong of the attack was to expressly include Levan in the company of David Paul, who was widely regarded in both South Florida and the nation as the most notorious looter of a savings and loan association (CenTrust) after Charles Keating. Three times in rapid succession, counsel for PaineWebber asked Levan during the trial if he knew that BankAtlantic had hired PaineWebber in 1984 "to keep people like you and David Paul . . . and other corporate raiders out." R63-194. The same phrase, "to keep people like you" out, was repeated each

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[5] In opening, counsel for PaineWebber had told the jury about take-overs: "We have all heard or read about takeovers in the last 10 years. A take-over is where a group of business types try to buy the stock of a target company, fire the old management, install new management and in time sell off the assets." R44-204.

time. Each time, Levan answered that he did not have knowledge of what the managers of BankAtlantic thought in 1984 when he was not even there. *Id.* But counsel for PaineWebber was unconcerned with the answers; he was playing to the passions of the jury about wealthy savings and loan executives.

Yet another prong of the personal attack was to build on the notion of Levan as a raider-thief. Counsel for PaineWebber told the jury that BankAtlantic "cooked the books" to hide the losses from the swaps so that a $3 million dividend could be paid to Levan. R66-120-21. PaineWebber's counsel characterized the testimony of Mr. Sarrica, BankAtlantic's current chief investment officer, as " 'Ah, listen, you know what? There were losses. We didn't report them.' Wink wink. 'We cooked the books. Sure, those losses aren't reflected in the financial statements and sure they are not reflected over here. We cooked the books.' " *Id.* Counsel for PaineWebber called such actions "a Federal crime" and he also characterized Mr. Sarrica as testifying: "We didn't report any losses because if we had reported a loss that would have wiped out 30 percent of the capital and then we couldn't pay dividends." *Id.*

In reality, Mr. Sirrica did not so testify or even come close to inferring such testimony. R55-4-128. Moreover, even though a dividend of $3 million was paid, it went to BankAtlantic's holding company (about $2 million) and to the other BankAtlantic shareholders (about $1 million), not to Levan personally. R63-167-218. In addition, and perhaps most significantly, after the dividend was paid, the holding company had put more than $6 million back *into* BankAtlantic. *Id.* Levan and his companies were not raiding or stripping the carcass of BankAtlantic. To the contrary, they were adding money to build up its capital, capital that was depleted in good measure by PaineWebber's breaches of fiduciary duty.

To tie to the present case the villainous description of Levan as a greedy, corporate raider stripping bare the carcass of BankAtlantic, counsel for PaineWebber offered the jury two false explanations of motive. One was revenge. In opening, counsel for PaineWebber told the jury: "BankAtlantic is not suing PaineWebber here because its employees didn't do their job." R44-204. The reason, he said, was PaineWebber's earlier effort to keep him from taking over BankAtlantic. *Id.* At closing, counsel for PaineWebber told the jury that "what this is all about" is "a vendetta, a revenge." R66-127-29. He told the jury PaineWebber was sued because it dared to get in the way of Alan Levan and try to prevent him from taking over BankAtlantic so he could "pull the income out and leave the carcass." *Id.*

The other motive counsel for PaineWebber suggested to the jury as a reason for this suit was pure greed. In opening, counsel told the jury: "we will show you that BankAtlantic takes their profits to the bank and their losses to court." R44-219. At closing, counsel reminded the jury: "As I told you, this [case] is nothing more than $100 with a Complaint. 'Let's ask for $100 million.' Throw the mud up on the wall and see what sticks." [6] *Id.*

II. JUROR MISCONDUCT: BRINGING EXTRANEOUS AND PREJUDICIAL INFORMATION ABOUT BANKATLANTIC'S CHAIRMAN TO THE DELIBERATIONS

Unknown to BankAtlantic at the time, PaineWebber's closing arguments were carefully addressed to a very tainted jury. On the same day as closing arguments, jury deliberations, and the verdict itself (all of which occurred Monday, November 13, 1989), Anthony Lippert

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[6] PaineWebber has a curious tendency to accuse others of the very wrongdoing in which it is engaging.

(the jury foreman) read a prejudicial *Miami Review*[7] newspaper article containing extraneous information about Alan Levan and BankAtlantic. Mr. Lippert had obtained that article from his employer, the one he concealed during voir dire and the one who was a law school classmate of counsel for PaineWebber.

The article read by Mr. Lippert was a front page story dated November 13, 1989, which featured a large picture of Alan Levan and which was entitled "A Big Week For BankAtlantic." R39-736-Exhibit B. It focused on a number of themes used later in the day by counsel for PaineWebber to attack Levan.

One of the most apparent of those themes was a disparaging view of Levan's income. Both under his picture on the front page and in the text of the article was a recitation of the precise amount of Levan's earnings: "Levan made $259,585 from BankAtlantic last year [1989], and an additional $660,336 from BankAtlantic Financial [the holding company], for a total of $919,921. Levan owns 39.6 percent of BankAtlantic Financial's stock." *Id.* The article, however, put this discussion about income in the context of BankAtlantic's poor earnings for the past year, which the article quoted Levan as calling "short-term earnings concessions" necessary to expand the scope of its banking services to include all those offered by commercial banks. *Id.* The article sarcastically summed up this situation by saying: "BankAtlantic's earnings 'concessions' to the commercial bank strategy didn't include salary concessions."[8] *Id.*

No doubt Mr. Lippert and any other juror who saw the article related that discussion in the article to the jury argument of counsel for PaineWebber that Alan Levan is a corporate raider who "pull[s] the income out

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[7] The *Miami Review* is affiliated with *The American Lawyer*.

[8] It should be noted that despite the staggering losses caused by PaineWebber, BankAtlantic is a profitable institution which meets or exceeds all capital requirements.

and leave[s] the carcass." R66-127. The article clearly provided extrinsic information to support the arguments of counsel for PaineWebber.

In a large headline on the second page of the *Miami Review* article was the statement: "BankAtlantic lays troubles at feet of critical shareholder." R39-736-Exhibit B. In the text, the article discussed at length pending litigation with that shareholder, Elliot Borkson. The article described the litigation as "pitting BankAtlantic against a minority shareholder" and as blaming "the shareholder for damaging the thrift's image and depressing its stock price." *Id.* In the course of its discussion, the *Miami Review* article quoted several financial experts as stating "that they don't buy BankAtlantic's effort to blame Borkson for its poor image and low stock price. The stock price is to be expected for a company with BankAtlantic's earnings results, they said, and the thrift still must prove it can make money in its basic operations." *Id.*

This additional extrinsic evidence obviously played directly into what counsel for PaineWebber argued to the jury, including the assertion that "we will show you that BankAtlantic takes their profits to the bank and their losses to court." The entire discussion in the article about, and even the existence of, the Borkston litigation, however, is something to which the jurors should not have been exposed. It was totally extraneous information of a very prejudicial nature. In fact, it was expressly excluded from evidence at trial. R39-736-3, 12; R(5776)3-743A-2. Not only was the jury foreman exposed, however, but the discussion (and extraneous evidence) tied into the highly prejudicial arguments made by counsel for PaineWebber, giving it great credence to the jury.

Not surprisingly in retrospect, the jury returned a verdict in favor of PaineWebber on the very same day that Lippert read the article of which PaineWebber's counsel made such extensive use during closing. A-40. It was as if the article had been devised to support and

supplement PaineWebber's scurrilous diversionary attack on Levan.

III. DISTRICT COURT EXAMINATION OF THE JURORS

BankAtlantic did not learn about this situation until the *Miami Review* published yet another article on February 5, 1990, entitled "Jury foreman ignored judge's order, read article." R39-736-2 and Exhibit A. As noted in the February 5 article, the trial judge, knowing about the November 13 article, had on the morning of November 13 expressly reiterated his early order that the jurors must not read any articles about the case. The judge had even polled the jurors to determine if they had seen the November 13 article or any other articles. R66-23-24. Following the lead of Anthony Lippert, each juror in turn had denied seeing anything. *Id.* Lippert's own admissions contained in the February 5 article thus established that he had been untruthful with the judge and had violated an express court order.

Based upon the facts reported in this second article, BankAtlantic filed a motion for new trial because of the juror misconduct. R39-736. The district judge set an evidentiary hearing to examine the jurors, but he stated that such examination would be conducted solely by himself. App. D at 39a.

The district judge also stated in his order setting the evidentiary hearing to examine the jurors that:

> The hearing will be limited to the objective evidence, *i.e.*, "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." FRE 606(b). The jurors will not be permitted to testify as to whether the extraneous materials affected their decision. *See Perkins*, 748 F.2d at 1534 n.15.

Id.

After desultory questioning by the district court judge, some additional facts did emerge. For example, despite

an express order not to read articles about the case, the substance of the November 13 *Miami Review* article was not only read by the jury foreman, it was also discussed among the other jurors just prior to closing arguments and, most likely, during deliberations that same day. R(5776)4-766B-1-5. In particular, the jurors admitted they knew it "was about Levan." *Id.* And as a result of the article, the jurors learned for the first time about the existence and substance of the Borkson litigation, evidence of which had been expressly excluded from the trial due to its prejudicial and irrelevant nature. *Id.*

From the judge's questioning, it was also learned that Lippert was employed as a real estate salesman and that he obtained the article from his employer. *Id.* The judge failed to pursue that information, however, and it was only through further investigation by BankAtlantic that the link with counsel for PaineWebber was discovered.[9] R766A, R766B. Moreover, the district judge failed to pursue in his questioning the contemptuous behavior of Lippert toward the court on November 13.

Instead, and contrary to his earlier order setting the evidentiary hearing, the district judge inquired of Lippert whether the article had an effect on his verdict. Lippert, not surprisingly, answered that it did not.[10]

The district court relied upon Lippert's answer when denying BankAtlantic's motion for new trial just shortly before departing the bench for private practice in Miami. He stated in the order:

> The Court acknowledges that juror Lippert's testimony that the extrinsic information was harmless is

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[9] Without access to discovery tools, which the trial judge did not allow, compulsory development of additional, formal proof by BankAtlantic on this matter was not possible.

[10] This is the same juror who talked with counsel for PaineWebber shortly after delivering the verdict in this case and then seconds later told a reporter (as quoted by PaineWebber on page 21 of its petition to this Court) that the action was "frivolous" and that he was "sorry to see the case in court."

> not controlling. *United States v. Bolinger*, 837 F.2d 436, 440 (11th Cir. 1988). However, since it may be considered as a factor in evaluating a claim of juror exposure to prejudicial extrinsic evidence, *id.*, the Court has included this aspect of juror Lippert's testimony in its assessment of Plaintiff's claim.

App. C at 33a and n.1.

It would be a tragic miscarriage if the district court judge's imminent departure from the bench and his return to the ranks of Miami lawyers caused him to lose enthusiasm for pursuing the wrongdoing by Lippert and counsel for PaineWebber. What should have been pursued vigorously by the trial judge was essentially dropped.

IV. REVIEW BY THE ELEVENTH CIRCUIT

In an opinion written by a senior member of the same district court as the trial judge in this case, the Eleventh Circuit took the same lackluster approach as the district court to the obvious prejudice caused BankAtlantic by the orchestrated attorney and juror misconduct. It is clear that the Eleventh Circuit simply looked for any statements by the district court or PaineWebber in the record—however inaccurate or misleading—to hold that the district court had not abused its "large discretion." [11] A-14-22.

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[11] On the substantive issues of the case, for example, the Eleventh Circuit relied for affirmance upon the assertion of PaineWebber that "BankAtlantic was aware of the risks associated with the interest rate swaps, such as rate fluctuations and prepayment of mortgages." A-13. That statement is both false and misleading.

The transactions involved in this case were very complicated, and the risks, most of which were not understood by BankAtlantic at the time, were also quite complex. The interest rate swap agreements were, as structured by PaineWebber, merely part of a larger "dynamic hedge" against adjustable rate mortgages designed to extend over a period of seven years. Not only honesty but also highly specialized expertise (both of which PaineWebber falsely represented that it had) is required to determine if such transactions are appropriate for any particular institution and, if so, to properly effectuate them. The same honesty and expertise is then required to manage the situation over the life of the swaps. As even PaineWebber's own expert stated, this is "tricky" business.

For example, the Eleventh Circuit followed the lead of the district court in accepting, as both credible and cognizable, Lippert's testimony at the evidentiary hearing that the November 13 *Miami Review* article had no effect on his partiality. A-17. This ignores the express provisions of Rule 606(b), Federal Rules of Evidence, prohibiting such testimony.

The Eleventh Circuit also accepted the district court's conclusion that only one jurror "had any knowledge about the contents of the newspaper article" despite testimony to the contrary by jurors at the evidentiary hearing. A-16, App. C at 32a. Similarly, both courts totally ignored the fact that Lippert was not just "a" juror but, rather, the jury foreman who had an apparent influence over the other jurors. *Id.* And both courts attempted to minimize the impact of the clearly prejudicial extraneous information contained in the November 13 article by completely ignoring the highly significant fact that it was read by the jury foreman just before closing argument and deliberations in violation of a court order.

Overall, the Eleventh Circuit failed to recognize the significance of the combined attorney and juror misconduct. The combination is so unusual that BankAtlantic has been unable to find any reported decision in which such a confluence of events as occurred in this case—especially where attorney misconduct blended so prefectly with juror misconduct—was considered. By mechanically analyzing juror misconduct in one discreet section of its opinion and attorney misconduct in another, the Eleventh Circuit lost sight of the whole picture.

Through the combined effect of attorney and juror misconduct, BankAtlantic was clearly prejudiced and the case was clearly not decided through the calm and dispassionate consideration of an untainted jury. The trial was fundamentally unfair, and neither the district court nor the Eleventh Circuit acted decisively to correct the injustice.

REASONS FOR ALLOWING THE WRIT

This is an extreme case of intentionally orchestrated attorney and juror misconduct. That misconduct caused a grossly unfair trial in a federal district court. BankAtlantic did not have a fair and impartial jury consider its case, and there was more than a reasonable possibility of prejudice to BankAtlantic as a result of the misconduct. A clear miscarriage of justice occurred.

On at least two occasions, this Court, in the exercise of its supervisory powers, has reversed jury verdicts based upon the introduction at trial of extraneous, prejudicial information through newspaper accounts read by jurors. *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959); *Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892); *cf. Murphy v. Florida*, 421 U.S. 794, 804, 95 S.Ct. 2031, 2038, 44 L.Ed. 2d 589 (1975) (in which Chief Justice Burger noted in a concurring opinion that he "would not hesitate to reverse petitioner's conviction in the exercise of our supervisory powers, were this a federal case").

In this case, there exists far more than just the introduction of extraneous, prejudicial information to the jury during trial. There was also, unknown to BankAtlantic at the time, a conscious and scurrilous use of that extraneous information by counsel for PaineWebber in the presentation of PaineWebber's case to a jury tainted by a foreman who had, by his acts of concealment and violation of court order, already demonstrated actual bias and lack of impartiality.

Moreover, both the district court and the Eleventh Circuit expressly decided to let the jury verdict stand based, at least in part, on the testimony of the jury foreman in a post-verdict, evidentiary hearing that the extraneous information did not influence him. A-17; App. C at 33a. Such reliance is directly contrary to the express provisions of Rule 606(b), which prohibits testimony as "to the effect of anything upon that or any other juror's

mind or emotions as influencing the juror to assent or to dissent from the verdict."

The provisions of Rule 606(b) on this point have long been the rule in this Court as clearly demonstrated by the opinion in *Mattox, supra*. In the *Mattox* case, this Court held that in ruling on a motion for new trial, the trial court should have considered post-verdict affidavits of jurors regarding their reading of a newspaper article and hearing comments of a bailiff during the course of a trial. Of great significance to this Court in so holding was that the jurors' affidavits contained no discussion of the influence the extraneous information had upon them:

> It will be perceived that the jurors did not state what influence, if any, the communication of the bailiff and the reading of the newspaper had upon them, but confined their statements to what was said by the one and read from the other.

13 S.Ct. at 52. *See also* the Court's discussion of authorities on this point at 13 S.Ct. 53. *See generally, Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987) (review of legislative history of Rule 606 establishes that this Court's views prevailed in language ultimately adopted).

This case is not the first case in which the Eleventh Circuit has completely overlooked the express provisions of Rule 606(b). In *United States v. Bolinger*, 837 F.2d 436, 440 (11th Cir. 1988), the Eleventh Circuit expressly stated that a district court may consider testimony of a juror that extrinsic information was harmless. Nowhere in the opinion did the court even mention, let alone consider, the prohibition on such testimony contained in Rule 606(b).

More generally, this case, as compared to other cases in which new trials were granted as a result of attorney misconduct, juror misconduct, or the injection of extraneous information, is an extreme one. *See, e.g., United States v. Perkins*, 748 F.2d 1519 (11th Cir. 1984); *Koufakis v. Carvel*, 425 F.2d 892 (2d Cir. 1970).

No doubt, however, other cases like the present one will arise in the future. In the past several decades since this Court's decision in *Marshall*, lawyers have become much more skilled and subtle in their means of influencing broadcast and print media, not only to promote themselves but also to influence the outcome of cases they handle. Lawyers have also become much more attentive to, and skilled in, the analysis and selection of jurors. When large sums of money or other high stakes are involved, the temptation to apply those skills improperly to influence or assure the outcome of a jury decision is great. Unfortunately, the federal district and circuit courts do not appear to have kept pace with such advances in "technology."

CONCLUSION

Therefore, to correct the present miscarriage of justice, to instruct the Eleventh and other circuit courts on the application of Rule 606(b), and to remind all federal courts of the need for vigilance to prevent both juror and attorney misconduct, this Court should grant BankAtlantic's cross-petition.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
S.D. FLORIDA

No. 87-6643-CIV

BANKATLANTIC, f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FORT LAUDERDALE,
Plaintiff,

v.

BLYTH EASTMAN PAINE WEBBER, INC.,
n/k/a PAINEWEBBER, INC.,
Defendant.

July 10, 1989

Eugene Stearns, Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, P.A., Miami, Fla., for plaintiff.

Arthur England, Schwartz, Nash, Block & England, Fine Jacobson, Miami, Fla., for defendant.

MEMORANDUM ORDER

SCOTT, District Judge.

The complaint in this action raises serious issues about the duties of a financial advisor to a federal savings and loan association. Even for a commercial dispute, the stakes are high—twenty-nine million dollars.[1] Plaintiff, BankAtlantic, claims that Defendant, PaineWebber, Inc.,[2]

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[1] Plaintiff also seeks punitive damages.

[2] Blyth Eastman Paine Webber, Inc., n/k/a PaineWebber, Inc.

has attempted to reduce the risk of loss on the merits by concealing damaging evidence in defiance of a prior Order. Plaintiff has moved to strike Defendant's pleadings and enter a default. Defendant denies any wrongdoing.

The Court is therefore faced with a delicate task. Our mission is to preserve the integrity of the discovery process while protecting Defendant's right to a full and fair trial on the merits. These important values sometimes conflict. When presented with such a case, the Court must balance the competing interests to reach a fair result.

The Court fully appreciates the personal, professional and financial interests affected by this motion. For that reason, we have been careful to afford both sides great latitude in their presentation of the issues, and we have given serious consideration to the product of their efforts. The parties have fully briefed the issues raised. The Court conducted a preliminary and full evidentiary hearing, where the parties questioned witnesses and introduced evidence over a period of three days. The transcript itself is over six hundred pages.

In addition, the Court has reviewed in detail all documents produced by Defendant in response to the Order to Show Cause issued after the preliminary hearing. Moreover, we have respected Defendant's assertion of various privileges pending in camera review. We have taken judicial notice of the entire record for the purpose of this motion. In sum, the parties have been given every possible opportunity to enlighten the Court on the facts and applicable law. After serious deliberation, we now render our decision.

I. BACKGROUND

The Court will briefly review the history of this case to provide a sense of perspective. Thus, before assessing Plaintiff's motion, we first discuss the underlying dispute and the ensuing discovery battle.

A. *Factual Allegations*

This litigation arises out of the triangular relationship between Plaintiff BankAtlantic, Defendant PaineWebber, Inc., and Homestead Savings ("Homestead"). Plaintiff is a federal savings and loan association. Plaintiff alleges that it retained Defendant as a financial advisor pursuant to an Engagement Letter executed on March 20, 1984. According to Plaintiff, Defendant suggested that Plaintiff agree to make certain investments known as interest rate swaps with Homestead to provide a beneficial hedge against interest rate risk.

Simply put, Plaintiff would swap some of its variable-rate interest obligations for Homestead's fixed-rate interest obligations. While the parties would not actually transfer their principal obligations, they would agree to compensate each other as interest rates fluctuated. Thus, if interest rates rose above the fixed rate, Homestead would pay Plaintiff the difference between the amount due on the variable rate obligations and the amount due on the fixed rate obligations. Similarly, if interest rates fell, Plaintiff would pay Homestead the difference.

Plaintiff claims that in reliance on Defendant's advice, it agreed to two interest rate swaps with Homestead on March 23 and August 3, 1984, in the principal amounts of thirty-five and fifty million dollars, respectively. According to Plaintiff, the match was arranged by Defendant's agent, Butch Tharp, and Defendant received a $225,000 fee.

The investment soon proved disastrous for Plaintiff. As interest rates fell, Plaintiff was forced to pay millions of dollars to Homestead. Plaintiff now estimates its losses at twenty-nine million dollars to date.

Plaintiff seeks to hold Defendant liable for these continuing losses based on various theories of fraud and breach of fiduciary duty. Plaintiff's entire case is grounded in one basic charge, however—conflict of inter-

est. According to Plaintiff, Defendant had a longstanding but undisclosed relationship with Homestead which directly conflicted with Defendant's role as Plaintiff's financial advisor. Plaintiff claims that this conflict precluded Defendant from warning Plaintiff about the immense risks of interest rate swaps. Plaintiff contends that Homestead was an improper swap partner, and that Defendant breached its duties by recommending the arrangement.

Defendant maintains that Plaintiff fully understood the risks of the investment. Moreover, by way of defense, Defendant argues that Plaintiff failed to mitigate its damages by selling the swaps or entering into reverse swaps. As to this defense, Plaintiff claims that no other financial institution was willing to assume Plaintiff's obligations, because Homestead was uncredit-worthy. Defendant disputes this contention, and suggests that Plaintiff is speculating on the investment with future profits in mind.

B. *The Discovery Dispute*

Plaintiff filed this action against Defendant on August 25, 1987. With the complaint, Plaintiff served Defendant with its first request for production. Two paragraphs of that request are at issue here:

> 8. All correspondence between you and Homestead Savings.
>
> 9. All documents relating to your association with Homestead Savings, including, but not limited to any contracts or engagement letters and any written or typed drafts of those contracts or engagement letters between you and Homestead Savings, and any correspondence, internal correspondence, notes or memoranda relating to your association with Homestead Savings.

Plaintiff defined "you" and "your" to include all affiliates of Defendant. Defendant filed various objections

to paragraphs eight and nine, including a claim that the request was overbroad in requiring Defendant to ensure production from its affiliates.

Plaintiff filed a motion to compel production soon thereafter. At the hearing, Defendant promised to produce all documents in its "custody, control or possession." Based on that representation, the Court denied the motion to compel from Defendant's affiliates, but granted the motion in all other respects. The parties also agreed that for purposes of production, Blyth Eastman Paine Webber, Inc., and the successor corporation, PaineWebber, Inc., would be treated as parties to the action. *See* Letter of October 4, 1988 at 3.

The parties proceeded with discovery and prepared for trial, which had been specially set for June 19, 1989, after two prior trial dates were continued. While the parties had the normal discovery battles of commercial litigation, the pretrial phase was rather uneventful overall.

This relative quietude was not to last, however. On the eve of trial, Plaintiff learned through independent investigation that Defendant and its affiliates had been involved in bitter litigation with Homestead in three separate lawsuits in the Northern District of California. Defendant had not produced a single document evidencing the California litigation.

II. ANALYSIS

Plaintiff charges that Defendant deliberately sought to conceal the California litigation because to disclose those cases would be to destroy its defense here. Plaintiff's entire complaint is predicated on a theory of conflict of interest based on an undisclosed relationship between Defendant and Homestead. Apart from the significance of the litigation itself, Plaintiff claims that documents produced from the California cases would have revealed volumes of evidence supporting its theory of the case here.

Plaintiff argues that Defendant should have produced documents from the California litigation pursuant to our Order granting in part Plaintiff's Motion to Compel documents relating to the association of Defendant and its affiliates with Homestead. Asserting grave prejudice from this eleventh hour discovery, Plaintiff urges the Court to strike Defendant's pleadings and enter a default. Plaintiff claims that no other sanction will sufficiently punish Defendant and deter likeminded third parties.

Defendant contends that none of the evidence available in the files of the California litigation is relevant to the issues on the merits of this action. Defendant further claims that documents from those cases do not fall within the scope of paragraphs eight and nine of Plaintiff's document request or the Order on Plaintiff's motion to compel.

In addition, Defendant argues that Plaintiff has failed to meet its burden on each element of the standard for determining whether to impose the sanction of default. The ultimate sanction of default may not be imposed unless the following elements are present: (1) Defendant acted wilfully and in bad faith; (2) Plaintiff was prejudiced as a result; (3) no lesser sanction would serve the punishment and deterrence goals of *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976), and its progeny. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980); *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440 (11th Cir.1985); *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 131 (SD. Fla.1987). We consider each of these contentions in turn.

A. *Relevance*

The California litigation at issue is comprised of three independent cases. In the first action, Homestead sued Defendant's affiliate, PaineWebber Real Estate Securities,

Inc. ("PWRES"), alleging breach of a mortgage loan servicing agreement. *Homestead Savings v. PaineWebber Real Estate Securities, Inc.*, Case No. 85-6894-RFP (N.D. Cal.) ("*Homestead I*"). In the second action, Homestead sued Defendant and various affiliated companies, seeking to hold these Defendant liable for the conduct of PWRES at issue in *Homestead I* under an alter ego theory. *Homestead Savings v. Paine Webber Group, Inc., Paine Webber Incorporated Capital Markets, PaineWebber, Inc., and Paine Webber Mortgage Finance, Inc.*, Case No. 87-1405-RFP (N.D.Cal.) ("*Homestead II*").

These two actions were settled on June 30, 1987. The various PaineWebber entities, including Defendant and PWRES, brought suit against their insurance carrier seeking recovery of amounts paid in settlement. The carrier also filed a declaratory action in federal court. The federal action was dismissed in favor of state court jurisdiction. *Fireman's Fund Insurance Co., Inc. v. PaineWebber Real Estate Securities, Inc., PaineWebber Group, Inc., PaineWebber, Inc. and PaineWebber Mortgage Fiance, Inc.*, 690 F.Supp. 879 (N.D.Cal.1988) ("*Fireman's Fund*"). As of this date, the state court action is still pending.

The Court has reviewed the pleadings and other record evidence produced to date from the California files. We are convinced that manifestly relevant and material evidence is contained in those files. Indeed, certain pieces of the puzzle, previously missing are located there. By way of example, we will demonstrate some of the ways in which that evidence might have been used at trial here.

1. Whether Defendant had an undisclosed conflict of interest in its dealings with Homestead and Plaintiff.

The California litigation explored a longstanding business relationship between PWRES and Homestead. Defendant contends that relationship is irrelevant in this

action, because PWRES is only an affiliate. It is true that no business relationship between Defendant and Homestead was at issue in the California cases. However, a remarkable fact has come to light through discovery of these cases.

Plaintiff has sued Defendant based in large part on the conduct of Defendant's agent, Butch Tharp. Tharp is allegedly responsible for matching Plaintiff with Homestead, and he allegedly acted as liaison between Plaintiff and Defendant. Plaintiff has always operated under the belief that Tharp was an employee of PaineWebber, Inc. The court file in *Homestead I* reveals for the first time that Plaintiff is mistaken. Tharp was not an employee of PaineWebber, Inc.; he was an employee of PWRES.

This revelation is so remarkable that even if no other new evidence was contained in California files, the Court would rule in favor of Plaintiff on the issue of relevance. Defendant's arguments to the contrary are unpersuasive. Surely the business relationship between Tharp's employer and Homestead is relevant in determining whether Tharp's advice was tainted by a conflict of interest. Moreover, the connection between Tharp, a PWRES' employee, and Defendant PaineWebber, Inc., would appear to undermine Defendant's argument that those two corporate entities are entirely separate.

2. Background on the interest swap placement.

The relationship between PWRES and Homestead provides some interesting background to the subsequent dealings between Plaintiff and Homestead. Certainly, Defendant could have recommended any number of other financial institutions for the interest swaps with Plaintiff. The jury is entitled to know why Homestead was chosen.

3-4. Homestead's financial condition, and Plaintiff's ability to mitigate damages.

One of the most hotly contested issues between the parties in this lawsuit is the question of mitigation. Defendant argues that even if the interest swaps were ill-advised, Plaintiff could have covered its losses by exiting the swaps. If Defendant is correct, Plaintiff might well be left with, at best, a paper victory—a finding of liability, but only nominal damages. Plaintiff's position is that mitigation was impossible because Homestead was uncreditworthy, and hence no other financial institution would have been willing to take Plaintiff's place.

In *Homestead I*, PWRES argued that it should not be held liable for terminating the loan servicing contract with Homestead, because Homestead was unable to meet its side of the bargain. According, to PWRES, the arrangement was disastrous. PWRES' principal theory was management overload in servicing, but it emphasized Homestead's financial losses in the servicing area as well.

For example, in its opening statement, PWRES termed the arrangement a "financial disaster" for Homestead. Moreover, in its pretrial statement, PWRES claimed:

> Evidencing the problems in, and unprofitable operation of, its loan servicing department, Homestead has recently established a $12 million reserve for loan servicing losses. This reserve is the largest loss reserve in Homestead's 99-year history. . . . [Homestead] has advised its shareholders that it is sustaining huge losses i[n servicing]. Moreover, PaineWebber has developed computer analysis of Homestead's servicing portfolio which indicate that Homestead is currently sustaining large losses in its portfolio and would have sustained even larger losses had Homestead purchased additional loans through PaineWebber.

Defendant argues that even though Homestead lost millions of dollars in the servicing area, it made millions

of dollars more in other departments, and therefore remained profitable. Defendant argues that creditworthiness is conclusively established by audited financial statements, which Defendant contends demonstrate the creditworthiness of Homestead for purposes of this litigation.

The Court is not persuaded by Defendant's narrow reading of the record in *Homestead I*. California counsel for Defendant and its affiliates testified at the evidentiary hearing that Homestead had made huge profits in the interest transaction area, which offset its losses in the servicing area. Plaintiff might well argue to the jury that Defendant's pairing of Plaintiff and Homestead was an attempt to compensate Homestead for the losses incurred in the servicing area.

More signficantly, Plaintiff's experts could testify that any other financial institution considering Plaintiff in the interest rate swaps would assess Homestead's business and management record, and not merely its financial records, before agreeing to assume Plaintiff's obligations. Even if Homestead's financial records demonstrate creditworthiness, a financial institution would hesitate before entering into a long-term business relationship with unstable or incompetent management.

Defendant does not dispute that the California files paint a dire picture of Homestead's management and logistical capabilities, at least in the servicing area. Again, in its opening statement, PWRES argues that Homestead did not maintain a budget. PWRES further claims that Homestead led the nation in customer complaints for loan servicing. The Federal Home Loan Bank Board conducted five special audits, and ultimately barred Homestead from further loan servicing without prior approval. PWRES argued that Homestead had "unbelievable problems with turnover," at one point losing more employees than they could hire. According to PWRES, Homestead lost thirty million dollars on five billion dollars worth of servicing. Ironically, these losses were in-

curred as interest rates declined and customers refinanced the loans. Subsequently, Defendant and PWRES' employee Butch Tharp suggested that Plaintiff swap loan obligations with interest rate fluctuations and the inevitable refinancing that results.

The point to be made here is that mitigation and creditworthiness are not issues to be determined by Defendant's unilateral reading of the evidence. These are issues for the jury. Plaintiff is entitled to present its theories of proof, and Defendant can counter with theories of its own. The finder of fact determines whose position is correct.

5. What PaineWebber, Inc. knew about Homestead's condition and when.

If Defendant possessed information indicating that Homestead was an unsuitable swap partner for Plaintiff, or if Defendant should have reasonably known that Homestead was unsuitable, then Defendant may have breached its duties to Plaintiff by recommending the match or by failing to apprise Plaintiff of the true facts.

6. Impeachment

Defendant plans to rely on statements by Homestead official John Halicky to support its contention that Homestead has been creditworthy at all times material to the current litigation between Plaintiff and PaineWebber, Inc. Yet, PWRES argued in *Homestead I* that Halicky had lied under oath about the volume of servicing complaints against the company. Indeed, Halicky denied that any significant number of complaints had been filed, in direct contravention of evidence which later became known to PWRES through discovery from federal agencies. Plaintiff is entitled to pursue this line of impeachment.

B. *Scope of Document Request and Order*

Despite the overwhelming importance of the information contained in the California files, Defendant denies

that Plaintiff was ever entitled to production through paragraphs eight and nine of the document request and the Order granting in part Plaintiff's motion to compel.

Defendant's first line of defense is that litigation does not constitute an "association," which is the term used in the document request, because litigation is distinctly "anti-associational." That argument is absurd. The obvious purpose of paragraphs eight and nine was to discover the scope and extent of Defendant's relationship with Homestead in order to demonstrate a conflict of interest.

Even if we were to accept Defendant's hypernarrow construction of the request, which is rather self-serving, Defendant would not prevail on this point. The California litigation involved a business association between PWRES and Homestead, even if PaineWebber, Inc. was not a contracting party.

That conclusion brings us to Defendant's next argument, which is that Defendant was not required to produce the documents from *Homestead I* because that action was brought only against an affiliate, PWRES. Certainly any documents from *Homestead II* and *Fireman's Fund* concerning Defendant's relationship with Homestead should have been divulged, because Defendant was a named party to those actions. This Court has previously so held. *See* Order to Show Cause.

Defendant cannot ignore its representation to the Court and to opposing counsel that it would produce all documents in its custody, control or possession responsive to the document request. Because of that representation, the Court did not require Defendant to seek production from its affiliates. Defendant was only required to produce documents from its own files and those files that it controls. This ruling is in keeping with the general principle that "control" for purposes of production means a legal right of access. *Searock v. Stripling*, 736 F.2d 650 (11th Cir.1984).

Both California counsel and Defendant's in-house counsel testified that Defendant enjoyed the right of access to all attorney files for Defendants in the California litigation.[3] Moreover, Defendant's paralegal testified that while she was not sent to pursue discovery in California, she was instructed in her other discovery efforts to search for any documents evidencing a relationship between Homestead and PaineWebber, Inc. *or any of its affiliates*. Defendant in fact produced other documents evidencing relationships between Homestead and PaineWebber affiliates. For these reasons, the Court rejects Defendant's argument that the document request, as modified by the Court's Order on the motion to compel, did not seek affiliate records in Defendant's possession, custody or control.[4]

In any event, Defendant cannot escape the fact that if it had met its obligation to disclose *Homestead II*, or even *Fireman's Fund*, Plaintiff would have been led inevitably to the *Homestead I* litigation. Apart from the obvious relationship between the three cases, each of the docket sheets contains a related case order referring the reader to the principal action. Under these circumstances, even if the Court were inclined to accept Defendant's affiliate theory, which we are not, we would still hold Defendant responsible for Plaintiff's lack of access to *Homestead I*.[5]

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[3] While Mr. Boutin testified that this right of access was limited by attorney-client and work product privileges, we did not find his testimony in that regard to be either credible or correct. Mr. Salzberg, who coordinated production for Defendant in this action, represented both PWRES and PaineWebber, Inc. as liaison to California counsel. Neither Mr. Salzberg nor Mr. Keesal, lead California counsel and a highly credible witness, even hinted at any contraints on Defendant's access to the records.

[4] Indeed, the document request itself sought all documents in Defendant's custody, control or possession, by its very terms.

[5] Defendant also argues that the parties limited the scope of production to interest swap transactions only. However, the record is devoid of proof in support of that proposition, and the Court

C. *Intent*

Defendant is thus left without any justifiable excuse for its failure to produce documents from any of the three California cases. Even so, Defendant claims that the Court cannot enter a default because Plaintiff has been unable to unearth specific proof of bad faith or intent on the part of Defendant in its discovery violation. Plaintiff responds that the record speaks for itself on the question of intent, and that Defendant should not be permitted to escape the rule simply because no "smoking gun" has been found.

The sanction of default is an extreme remedy, but it is within a district court's broad discretion to resort to it when appropriate. Default may be imposed when the conduct of the targeted party amounts to "willfulness, bad faith, or . . . fault." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640, 96 S.Ct. 2778, 2779, 49 L.Ed.2d 747 (1976). "Fault" is an amorphous concept, but it has been defined to authorize the sanction of default where counsel has "disregarded" its professional responsibilities in the discovery process or to the court, *see Aztec Steel Co. v. Florida Steel Corp.*, 691 F.2d 480, 481 (11th Cir.1982), or where counsel's conduct rises to the level of "gross negligence," *see Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1068 (2d Cir.1979). Thus, where specific proof of intent eludes the movant, default is still appropriate when counsel "clearly should have understood his duty to the court." *Cine Forty-Second Street*, 602 F.2d at 1068.

The Court will separately assess the culpability of in-house and local counsel in applying this standard to the record before us. By way of prelude, we note that the participation of in-house counsel obviates any concern that the Court avoid visiting the sins of the lawyers on

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cannot even imagine Plaintiff agreeing to restrict its request to such narrow bounds.

the client. In this case, in-house counsel supervised local counsel in the defense of the action, and actively participated in discovery decisions. Moreover, members of in-house counsel hold senior positions in the corporation. Under these circumstances, any fault of in-house or local counsel should be imputed to the client.

1. In-house counsel

It should come as no surprise that in-house counsel to PaineWebber, Inc. had complete knowledge of all critical facts underlying the motion to strike. With an insider's vantage point, in-house counsel fully appreciated, perhaps more than local counsel, the significance of the California litigation to this action.

The assistant general counsel, Robert Salzburg, and general counsel, Berson, acted as the principal liaison for both PaineWebber, Inc. *and* PWRES to the independent California counsel in all three California cases. Salzburg explained that he acted as counsel to PWRES because PWRES did not have its own inside counsel. Moreover, in-house counsel James Treadway signed the joint settlement agreement for *Homestead I* and *II* on behalf of all PaineWebber entities, as counsel to PaineWebber, Inc., and with a power of attorney for PWRES.

At the evidentiary hearing on the motion to strike, Salzburg made a passing attempt to shift the responsibility for production decisions to local counsel, without success. Salzburg was the first to review the complaint and document request. He hired and supervised local counsel. Moreover, Salzburg was the designated records custodian for PaineWebber, Inc. at the deposition conducted pursuant to Federal Rule of Civil Procedure 30 (b)(6). If any doubt remains, we note that Salzburg testified that he ratified all of local counsel's actions preceding the motion to strike.

2. Local counsel

Local counsel admits knowledge of *Homestead I*, but claims that in-house counsel neglected to inform them of

Homestead II or *Fireman's Fund*. Local counsel, Bennett Falk and Keith Olin, met with California counsel, Peter Boutin, in May 1988. The parties discussed *Homestead I*. Falk claims that he asked Boutin whether PaineWebber, Inc. had any involvement in the litigation and was told that it did not. Boutin does not recall this exchange.

Local counsel did review some of the pleadings from *Homestead I* at the meeting, but they made no effort to search the files for documents responsive to Plaintiff's document request. Salzburg, who arranged the meeting between local and California counsel, testified that counsel did not plan to search the files there. He did not explain what the purpose of the meeting might otherwise have been.

When Falk and Olin returned to Miami, they briefed their colleague O'Bannon Cook on the meeting. Shortly thereafter, Cook defended Butch Tharp's deposition. Cook knew that Tharp was a PWRES' employee; he knew that Homestead had just settled an action against PWRES in California. Yet Cook interfered with Plaintiff's attempts to nail down which corporate entity Tharp was referring to in his deposition, and Tharp was studiously imprecise. Indeed, to deflect the fire from Tharp, Cook promised to review the transcript of the deposition and correct any responses which were incorrect in reference to a PaineWebber entity.

Cook wholly failed to meet his obligations in that regard. Tharp's testimony was entirely misleading to Plaintiff, and Cook did nothing to correct it. In particular, Cook failed to correct the record to reflect that Tharp was an employee of PWRES, and not of PaineWebber, Inc.

When pressed for an explanation, Cook testified that it was a mere oversight, and that he did not intend to hide Tharp's affiliation with PWRES. The Court rejects that testimony. According to Cook, it would have been irra-

tional for him to think that he could hide the PWRES connection, because Plaintiff was bound to be tipped off by other evidence. However, the only other evidence shown in the record on this point is that Plaintiff has done a substantial amount of business with PWRES. The significance of that fact escapes the Court. Plaintiff's connections with PaineWebber entities were not at issue; Homestead's connections were. Lacking critical knowledge of Tharp's PWRES' affiliation, Plaintiff had no reason to pursue PWRES in discovery by subpoena or otherwise.

Moreover, that Defendant almost succeeded in keeping the truth hidden belies counsel's protests that it could not reasonably have thought it could do so. In the face of this argument, Cook claims that he should not be blamed for his lack of specificity to opposing counsel, because, "People just don't talk that way" about corporate entities. In response, the Court would remind counsel that lawyers should "talk that way," especially when they promise to do so.

The Court is also disturbed by the fact that, to this day, no counsel for Defendant has searched the *Fireman's Fund* files for documents sought by Plaintiff in this action. California counsel (Bennett) testified that even when local counsel travelled to California after the first hearing on Plaintiff's motion to strike, local counsel searched the "Keesal files" only, meaning *Homestead I* and *II*, and not the *Fireman's Fund* files, even though those files were freely available to them.

3. Analysis

The Court has considered the full record and in particular the testimony of Defendant's counsel. Counsel fully appreciated the impact that disclosure of the California litigation would have on this action. Counsel's failure to produce documentation cannot be said to have

been a mere oversight, when the evidence withheld is of such importance and no reasonable excuse is offered.

The sequence of events early in the litigation compels the conclusion that counsel made a deliberate choice to bury the evidence and prevent disclosure. In May 1988, local counsel met with California counsel to discuss *Homestead I*, but failed to search the files for responsive documents. In June 1988, Cook defended Tharp's deposition, and failed to disclose the witness' affiliation with PWRES. In July 1988, Cook represented to the Court that Defendant would produce all responsive documents in its custody, control or possession if the Court would deny Plaintiff's motion to compel production from the files of Defendant's affiliates. Defendant failed to do so.

In short, Defendant did its utmost to keep Plaintiff in the dark, and the truth hidden. Local counsel failed to produce documents from *Homestead I*. In-house counsel failed to produce documents from *Homestead II* or *Fireman's Fund*. Cook diverted Plaintiff from the truth at Tharp's deposition, and then broke his promise to correct the record. Cook manipulated the Court into narrowing Plaintiff's document request to prevent disclosure from affiliates, including PWRES, and then broke his promise to produce records from Defendant's own files. That representation to produce all documents in Defendant's control was the foundation of the Court's Order denying production from affiliates.

Having ensured that Plaintiff would not learn about the California litigation on its own, Defendant then disregarded its duty to produce documentation evidencing that litigation. Indeed, if counsel is to be believed, Defendant also failed to search its own corporate files in New York to determine if relevant documents existed there. Given the record existing at this point, it seems more likely that Defendant simply chose to withhold relevant evidence from New York, as well as California. The Court does not reach that question on the record before us. However,

it is abundantly clear that, at a minimum, counsel failed to meet its obligation to search Defendant's corporate and attorney files for responsive documentation.

Thus, the Court finds that ample evidence exists in the record to support a finding of willfulness by Defendant and Defendant's counsel in withholding critical evidence in the face of a court order compelling disclosure. Moreover, even if the record did not support a finding of intent, there can be no question that counsel acted in complete disregard of its responsibilities to opposing counsel and to the Court in the discovery process, either deliberately, or through gross negligence. Accordingly, the Court concludes that it is empowered to choose the sanction of default from its arsenal if the remaining elements of the three-pronged test are met.

D. *Prejudice*

There can be no question that Plaintiff has been prejudiced as a result of Defendant's conduct. Plaintiff learned of Defendant's discovery violation on the eve of trial. Plaintiff was poised to present its case when volumes of new evidence were uncovered. Considering the complex nature of this litigation, the prejudice to Plaintiff from the wasted trial preparation is substantial.

Moreover, the newly discovered evidence radically alters the nature of Plaintiff's case. We have already demonstrated the materiality of the documents. The import of the evidence previously withheld goes beyond materiality, however. An entirely different player has entered the field—PWRES. Plaintiff may well seek to add PWRES as a party defendant now that Tharp's PWRES' affiliation has come to light. Even if Plaintiff chooses not to pursue that course, Plaintiff will still be forced to pursue avenues of discovery to explore the contours of Homestead's relationship with PWRES in order to support its theory of conflict of interest.

Despite this irrefutable proof of prejudice, Defendant contends that, as a matter of law, Plaintiff cannot be held to have been prejudiced because Plaintiff could have subpoenaed the documents directly from PWRES but failed to do so. Defendant would apparently have the Court excuse its misconduct based on some theory of comparative fault. We decline to do so.

To accept Defendant's position would vitiate the purpose of the sanctions rule. When a party has been ordered to produce documents, and those documents are in its control, Defendant must produce the documents or else face the consequences. There is simply no other choice. It is not within Defendant's prerogative to complain that Plaintiff might have secured the documents from some other source. Defendant has been ordered to produce them, and Defendant must comply.

To hold otherwise would undermine the authority of the Court and the integrity of the system. Negligence by Plaintiff cannot erase willful misconduct by Defendant in defiance of a court order. Defendant's suggestion to the contrary is unseemly. Defendant's obvious purpose is to divert attention from its own wrongdoing by pointing the finger at Plaintiff.

Searock v. Stripling, 736 F.2d 650 (11th Cir.1984), relied on by Defendant, is inapposite. In *Searock*, the Eleventh Circuit held that default is improper when counsel's failure to comply is due to an inability to provide discovery rather than willfulness or bad faith conduct. The documents at issue in *Searock* were in the custody and control of a third party, and not the defendant. Both parties knew this to be the case. Defendant had only volunteered to procure the documents from the third party, but the third party refused to cooperate. In passing, the court observed that the movant might have easily subpoenaed the evidence directly from the third party custodian. That case therefore has no application

where counsel fails to produce documents in its possession, custody, or control.

In any event, even if the Court were inclined to adopt Defendant's rather novel comparative fault theory, we would find that it has no application on the record before us. Plaintiff has been more than diligent in pursuing discovery in this case. Plaintiff had no reason to target PWRES with subpoenas for the documents at issue here. Plaintiff did not even know that these particular documents existed. This is not a case in which Plaintiff knew that a third party, and not Defendant, possessed the documents, and yet sat idly by while Defendant refused to procure them. Plaintiff has conducted itself with the utmost good faith, and we decline to penalize Plaintiff for Defendant's wrongdoing.

Based on this analysis, the Court concludes that Plaintiff has made a sufficient showing of prejudice to support entry of default should the Court in its discretion decide to impose it. Plaintiff has also offered an independent argument for a finding of prejudice in the form of financial detriment to the Plaintiff corporation. Defendant strongly opposes Plaintiff's position.

According to Plaintiff, it has been prejudiced by Defendant's intransigence because the day of judgment has been postponed. If Plaintiff is entitled to prevail on the merits, Plaintiff would like immediate access to the fruits of victory. Plaintiff claims that it is unable to sell stock to raise capital. Plaintiff contends that it barely meets the capital requirements of federal law, and that the federal capital requirements are about to be increased. Plaintiff further claims that it is unable to raise money on the capital market. Finally, Plaintiff reminds the Court that the potential judgment in this case represents about one half of its current capital base.

Defendant dismisses Plaintiff's argument as "nonsensical." According to Defendant, the Court should decline to recognize any prejudice to a plaintiff from the lack of

access to money damages which the plaintiff may not be entitled to on the merits. Any prejudice on this grounds is, to Defendant, purely speculative.

The Court listened closely to the testimony of Bank-Atlantic official Alan Levan, both on direct and cross-examination. We listened patiently to counsel's heated arguments on this point. We have concluded that the entire debate, while interesting, is unnecessary. Plaintiff has demonstrated ample prejudice through the time and expense of wasted trial preparation. On a motion for default, no further proof of prejudice is necessary. The Court declines to fashion a rule that would hold a defendant responsible for the very existence of the opposing party due to a delay of trial, even if the delay is due to the ~~fault~~ of the defendant, unless the defendant by its conduct actually sought that result. However, in consideration of a remedy, the Court will remain sensitive to Plaintiff's financial position.

E. *Alternative Sanctions*

Plaintiff contends that the Court has no choice but to enter a default because Defendant's conduct was willful and Plaintiff has been prejudiced as a result. We disagree. The Court recognizes that it must consider the availability of lesser sanctions before resorting to a default. Neither party has proposed alternative sanctions here.

Default is a draconian measure that should be imposed only in exceptional cases. Even if the court finds that counsel's conduct was willful, default is not mandatory. The court should not be quick to forfeit a party's right to a full and fair trial on the merits. Instead, the court must fashion a sanction that is proportionate to the particular offense, while keeping the deterrence and punishment goals of the rule in mind. At the same time, the court should order compensation to the movant in an effort to cure any demonstrable prejudice.

This determination involves a sliding scale analysis. The more culpable Defendant's conduct, the greater the sanction that is required. If Defendant's conduct is highly culpable, then prejudice to Plaintiff is not the focal point. The judicial system must be vindicated and likeminded parties deterred.

The Court has carefully considered the record in this case in an effort to resolve the competing interests at stake. In our view, this presents a very close case on the issue of default. Upon reflection, however, the Court has determined that default is not an appropriate sanction, because lesser sanctions will serve the punishment and deterrence goals of the rule. The Court is convinced that Defendant acted willfully and in bad faith. However, in our view, a twenty-nine million dollar default would be a disproportionate sanction for violation of a single Order, on the basis of the evidence presented by Plaintiff to date.

This determination is not to be taken as approval of Defendant's conduct. On the contrary, should Plaintiff discover any further evidence of intentional misconduct by Defendant, on this matter or in the future course of the litigation, we invite Plaintiff to renew its motion. Further evidence to that effect may well tip the balance in favor of granting the motion.

III. CONCLUSION

The Court has concluded that Defendant withheld evidence in bad faith and in violation of a prior Order. Plaintiff has been seriously prejudiced as a result of Defendant's discovery violation. In order to redress Plaintiff and implement these findings on the record, it is hereby ORDERED as follows:

1. Plaintiff's motion to strike is DENIED without prejudice to renew, as outlined above.

2. This cause is hereby specially set for trial on October 9, 1989, with a calendar call to be held on October 4,

1989 at 9:30 a.m. The Court will grant an additional thirty day continuance for good cause shown. The Court stands ready to proceed to trial immediately should Plaintiff elect to decline further discovery.

3. No later than twenty calendar days from entry of this Order, Defendant shall produce all witnesses requested by Plaintiff in Miami for deposition.

4. No later than ten calendar days from entry of this Order, Defendant shall produce all documents from California and New York requested by Plaintiff and responsive to paragraphs eight and nine of the first document request. The documents shall be produced in Miami, or, at Plaintiff's option, shall be made available to Plaintiff in California and New York.

5. Defendant, PaineWebber, Inc., and local counsel, Ruden, Barnett, McClosky, Smith, Schuster & Russell, shall bear equally the reasonable costs of Plaintiff's time and preparation in filing the Motion to Strike and in preparing for the new trial date, including the costs of expedited discovery.

6. Defendant and local counsel shall immediately post a $250,000 cash bond to secure Plaintiff's costs and fees.

7. The amount of costs and fees is to be determined post-trial. The parties shall first attempt to reach a resolution of that issue without the assistance of the Court. Should the parties fail to agree, Plaintiff shall file a motion for costs and fees with supporting affidavits.

8. Defendant shall keep a daily log of all efforts to comply with discovery obligations from this date forward, and shall file on the record a detailed report on these efforts every fifteen calendar days from entry of this Order to the date of trial.

9. Should Plaintiff ultimately prevail on the merits of this action Defendant shall be liable for triple interest at the statutory rate, to be fixed as of June 19, 1989, and to run from that date forward.

10. All privileges except settlement privilege previously available to Defendant in discovery of the California litigation are considered waived by reason of Defendant's failure to assert the privilege at the time of the document request. The Court is not disposed to consider any further assertion of privilege by Defendant in regard to that discovery. However, the Court will consider an assertion of privilege in an extreme case. The Court further counsels Plaintiff to exercise restraint in the use of privileged documents. The Court will not countenance any objections as to relevance or overbreadth.

11. At trial, the jury will be instructed on Defendant's failure to provide discovery as one factor to be considered in determining Defendant's liability. The Court will address this issue in a subsequent Order. The parties are advised that the Court is of the view that concealment of evidence, like flight from law enforcement, is an appropriate consideration on the merits for the factfinder.

12. By way of this Order, the Court hereby advises the Honorable Robert F. Peckham, United States District Judge, Northern District of California, of Defendant's use of the confidentiality orders entered in actions before Judge Peckham to secrete documents sought on the merits of this action. The Court requests that Judge Peckham immediately reconsider and lift those orders so that Plaintiff may pursue discovery. Defendant shall move for an Order to that effect forthwith.

13. The Court intends to publish this Order in the official reporters to deter future misconduct by Defendant and likeminded third parties.

14. The Court has not excluded the possibility of appropriate fines to be imposed on Defendant and counsel, in addition to the sanctions outlined above. The Court reserves that issue post-trial.

DONE and ORDERED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 87-6643-CIV-SCOTT

BANKATLANTIC, f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FT. LAUDERDALE,
Plaintiff,

v.

BLYTH EASTMAN PAINE WEBBER INC., n/k/a PAINEWEBBER, INC.,
Defendant.

MEMORANDUM

[Filed Oct. 27, 1989]

Plaintiff has moved to exclude from evidence any testimony regarding Alan Levan's business transactions, ownership interests and income from Bank Atlantic. Plaintiff argues that such evidence is not relevant. Plaintiff further contends that even if the evidence is relevant, it is too prejudicial to submit to the jury. Defendant argues that the evidence is relevant to show Levan's bias and interest in the outcome of litigation as well as Plaintiff's motive in bringing this action.

I.

The partiality of a witness is subject to exploration at trial, and is " 'always relevant as discrediting the witness and affecting the weight of his testimony.' " *Davis v. Alaska*, 445 U.S. 308, 316, 94 S.Ct. 1105, 1110 (1974)

(citing 3A J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970)). Because of the importance of evidence of bias or interest, inquiry into the area is never collateral. *United States v. Calle*, 822 F.2d 1016, 1021 (11th Cir. 1987). While the Court may exercise discretion over the extent of proof, it must ensure "ample latitude for pertinent inquiry." *Wynn v. United States*, 397 F.2d 621, 624 (U.S. App. D.C. 1967) (footnote omitted). Counsel attempting to show bias or interest must be "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witnesses" *Davis*, 415 U.S. at 318, 94 S.Ct. at 1111. Under these principles, the Court concludes that evidence of Alan Levan's ownership interests and income from BankAtlantic is sufficiently probative of his possible bias or interest in the outcome of this litigation, and is thus relevant.

II.

As in the case of other relevant evidence, evidence of bias may be inadmissible when it creates a danger of unfair prejudice, confusion of the issues, misleading of the jury, or results in a needless presentation of cumulative evidence. Fed. R. Evi. 403. Here, Plaintiff argues that the probative value of the bias and interest evidence concerning Alan Levan is outweighed by unfair prejudice. However, just as Plaintiff underestimates the relevance of the evidence, it also overrates its prejudicial effect on the jury. While the evidence may be unfavorable to Plaintiff, we do not view it as inflammatory in the context of this record, i.e., the sort of evidence that arouses the irrational passions of a jury. *See Brink's Inc. v. City of New York*, 717 F.2d 700, 710 (2d Cir. 1983) (evidence must be more than "damning" to be excluded under Rule 403, it must be "inflammatory"). It would therefore be inappropriate to exclude this evidence under Rule 403 of the Federal Rules of Evidence. Given the relevance of the evidence and its limited prej-

udicial effect, admission of testimony regarding Alan Levan's relationship with BankAtlantic is warranted. Plaintiff's motion is therefore denied.

III.

The Court emphasizes that at this juncture our ruling is limited to permitting Defendant to elicit this testimony on cross-examination if Levan is called in the Plaintiff's case-in-chief. While the Court recognizes that under Rule 607 of the Federal Rules of Evidence the credibility of a witness may be attacked by any party, it would be an abuse of that rule for Defendant to call Alan Levan as a witness merely to elicit this testimony. *See United States v. Capella*, 479 F.2d 1153, 1158 (10th Cir. 1973) (only purpose of impeachment is to neutralize damaging testimony); *Gorgon v. United States*, 383 F.2d 936, 940 (U.S. App. D.C. 1967) (legitimate purpose of impeachment is not to show that the accused who takes the stand is a "bad person" but rather to show background facts which bear directly on whether jurors ought to believe him rather than other and conflicting witnesses); (*United States v. Miller*, 664 F.2d 94 (5th Cir. 1981) (prosecutor may not use prior inconsistent statement of hostile government witness which tends to inculpate defendant, under the guise of impeachment, for primary purpose of placing before jury substantive evidence which is not otherwise admissible); *United States v. Webster*, 734 F.2d 1191 (7th Cir. 1984) (it would be an abuse of Rule 607 for prosecution to call witness that it knew would not give useful evidence, just so it could introduce hearsay evidence against defendant in hope that jury would miss stuble distinction between impeachment and substantive evidence or would ignore it). Indeed, during oral argument, defense counsel admitted as much. Therefore, if Plaintiff elects not to call Alan Levan, the Court takes no position as to whether, and, under what circumstances, the Defendant can call and impeach Levan from the financial evidence. At that point, we will await

a proffer by the Defendant demonstrating the relevancy of the testimony. We will then exercise our sound discretion over the extent of the proof that Defendant may elect to impeach Levan from his financial relationship with BankAtlantic. *Wynn v. United States*, 397 F.2d at 624.

DONE and ORDERED in Open Court at Miami, Florida this 22nd day of October, 1989.

/s/ Thomas E. Scott
THOMAS E. SCOTT
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 87-6643-CIV-SCOTT

BANKATLANTIC, A Federal Savings Bank, f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FORT LAUDERDALE,

Plaintiff,

v.

BLYTH EASTMAN PAINE WEBBER, INCORPORATED, n/k/a PAINEWEBBER, INCORPORATED,

Defendant.

ORDER

[Filed Aug. 14, 1990]

This case is before the Court upon Plaintiff's Motion for New Trial and Supplemental Motion for New Trial. The motions raise three distinct claims of juror misconduct as the basis for a new trial. The Court has considered the arguments of counsel, the pertinent legal authorities and the in camera testimony of all jurors participating in the verdict. It is now ready to rule.

I. DISCUSSION

A. *Extrinsic Evidence*

Plaintiff first argues that a new trial should be granted because the foreman of the jury, Anthony Lippert, read a newspaper article published in the *Miami Review* containing extraneous and prejudicial information. In assessing this claim of juror misconduct, the Court in-

itially notes the applicable standard as set forth by the Eleventh Circuit:

> When jurors consider extrinsic evidence, we require a new trial if the evidence poses a *reasonable possibility of prejudice* to the [movant]. *United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir. 1984); *United States v. Howard*, 506 F.2d 865 (5th Cir. 1975). Prejudice is not presumed. The [movant] has the burden of demonstrating prejudice by a preponderance of credible evidence. *United States v. Winkle*, 587 F.2d 705, 714 (5th Cir. 1979). "Such evidence may be shown by evidence that extrinsic factual matter tainted the jury's deliberations." *Id.* However, since it is the court's duty to ensure that the jury verdict was in no way tainted by improper outside influences, the court must investigate the asserted impropriety upon merely a colorable showing of extrinsic influence. *Id. See also, Sheppard v. Maxwell*, 384 U.S. 333, 362-63, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966). Subject only to Federal Rule of Evidence 606(b), the court may use whatever inquisitorial tools are necessary and appropriate to determine prejudice. *United States v. Savage*, 701 F.2d 867, 871 (11th Cir. 1983). If after this inquiry the court determines that the [movant] met his burden of showing by a preponderance of the evidence the likelihood of jury prejudice, the burden shifts to the [non-movant] to prove that the consideration of the extrinsic evidence was harmless. *United States v. Perkins*, 748 F.2d at 1533; *United States v. Howard*, 506 F.2d at 869. In recognizing the degree of prejudice required and the [non-movant's] burden to establish harmless error, the strength of the [non-movant's] case has a bearing on the issue of prejudicial error. *United States v. Spurlock*, 811 F.2d 1461, 1463 (11th Cir. 1987). Also relevant is the nature of the information learned by the jurors and the manner in which it

was revealed. *Government of Virgin Islands v. Dowling*, 814 F.2d 134, 138 3d Cir. 1987).

United States v. Rowe, No. 88-8850, slip op. at 3913 (11th Cir. July 24, 1990) (emphasis in original).

In accordance with its duty to investigate, the Court conducted in camera interviews of all eight jurors that participated in the verdict. Based upon the jurors' responses under oath during the interviews and the Court's assessment of each juror's credibility, the Court makes the following findings:

1. Prior to closing arguments, juror Lippert read an article published by The Miami Review on November 13, 1990 entitled *A Big Week for Bankatlantic.*

2. Another member of the panel, juror Capo, saw only the headline of the article while driving by a newspaper vending machine. Juror Capo related this fact to the other jurors and when she did, juror Lippert replied that the article had nothing to do with this case.

3. The jury never discussed the substance of the newspaper article during the trial or the jury's deliberations.

4. Only juror Lippert read the newspaper article. Over the course of the trial and the deliberations in this case, none of the other members of the panel had any knowledge about the contents of the newspaper article.

The Court is convinced that these facts do not establish the level of prejudice necessary to warrant a new trial. Indeed, based on the nature of the extrinsic influence and the extent of juror exposure, the Court finds that Plaintiff has not even met its burden of demonstrating prejudice by a preponderance of the evidence. Defendant is therefore not required to prove that the consideration of the extrinsic evidence was harmless. *See United States v. Rowe*, No. 88-8850, slip op. at 3914 (11th Cir. July 24, 1990) (holding that government was not required to show harmlessness, where defendant failed to show by a

preponderance of evidence the likelihood of prejudice from jurors' consideration of extrinsic evidence).

The newspaper article at issue in this case is not sensational in nature. It is a factually oriented account of Plaintiff's financial condition and its involvement in another lawsuit with its shareholders ("the Borkson litigation"). The actual facts contained in the article relating to the *Borkson* shareholder suit are not prejudicial. Plaintiff contends that the *Borkson* evidence must be prejudicial because the Court excluded it at trial. However, the Court excluded evidence concerning the *Borkson* litigation because it was irrelevant, and not because it was prejudicial. The remaining facts in the article relating to BankAtlantic's financial standing and the suit against PaineWebber are also not prejudicial. The article says nothing that the jury had not already heard during the trial of this case. Indeed, the facts contained in the article, if introduced at trial, would have been merely cumulative of the existing facts already in evidence. The article cannot therefore be considered so prejudicial as to warrant a new trial.

Additionally, the newspaper article was read by only one juror who deliberated in this case. None of the other jurors had any knowledge of the substance of the article. The jury never discussed the contents of the article during the trial or the deliberations. In fact, the juror who did read the article testified that in his view, the article had nothing to do with this case. Juror Lippert also testified that the article had no effect on his verdict.[1] This Court observed juror Lippert during his interview and finds his testimony credible.

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[1] The Court acknowledges that juror Lippert's testimony that the extrinsic information was harmless is not controlling. *United States v. Bollinger*, 837 F.2d 436, 440 (11th Cir. 1988). However, since it may be considered as a factor in evaluating a claim of juror exposure to prejudicial extrinsic evidence, *id.*, the Court has included this aspect of juror Lippert's testimony in its assessment of Plaintiff's claim.

Given the facts and circumstances of this case, the Court cannot agree with Plaintiff's position that harmful prejudice invaded the jury deliberations and tainted the verdict in a way that denied Plaintiff a fair trial. Juror Lippert's reading of the newspaper article simply did not so taint the jury as to create a reasonable possibility of prejudice to Plaintiff. Since Plaintiff has failed to prove the likelihood of jury prejudice by a preponderance of the evidence, this incident of juror misconduct cannot serve as the basis for a new trial.

B. *Voir Dire Examination of Jurors Chanquet and Lippert*

Plaintiff further argues that a new trial is warranted on the ground that jurors Chanquet and Lippert provided untruthful answers to questions posed to them on *voir dire*. Specifically, Plaintiff contends that juror Chanquet failed to disclose the fact that a judgment had been entered against him in a lawsuit in which the federal government contended that he obtained student loans on the basis of false information. With respect to juror Lippert, Plaintiff asserts that juror Lippert failed to disclose his employment as a real estate salesman with a real estate company that is owned by an attorney who attended law school with one of the partners of the law firm representing Defendant in this litigation.

In *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984), the Supreme Court established the standard for granting a new trial in cases where pertinent information was not disclosed on *voir dire*:

> to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but

> only those reasons that affect a juror's impartiality can truly be said to affect fairness of a trial.

Id. at 556, 104 S.Ct. at 850.

For purposes of this motion, the Court assumes that Plaintiff has satisfied the first requirement of the *McDonough* test. The Court finds, however, that Plaintiff cannot satisfy the second requirement. Plaintiff has not shown that correct responses by jurors Chanquet and Lippert would have supported a challenge for cause.

"A party who seeks a new trial because of nondisclosure by a juror during *voir dire* must show actual bias." *United States v. O'Neill*, 767 F.2d 780, 785 (11th Cir. 1985) (quoting *United States v. Tutt*, 704 F.2d 1567, 1569 (11th Cir.) (per curiam), *cert. denied*, —— U.S. ——, 104 S.Ct. 174, 78 L.Ed.2d 156 (1983). "Actual bias may be shown in two ways: by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed." *United States v. Perkins*, 748 F.2d 1519, 1532 (11th Cir. 1984) (citations omitted).

In this case, there has been no admission of bias. Nor does the evidence support a presumption of actual bias. Neither Chanquet's involvement in civil litigation dissimilar to this litigation nor Lippert's employment with a real estate company owned by a former classmate of one of Defendant's attorneys constitute actual bias. Lippert and Chanquet have no connection to either party in this case or to similar litigation. Neither party had a motive to conceal information just to get on the jury and find against BankAtlantic. Indeed, to the contrary, the evidence demonstrates Lippert and Chanquet's willingness to serve as impartial members of the jury. *See* Trial Transcript, Vol. 1, pages 38 and 39; March 30, 1990 Transcript, pages 36 and 41. Absent a showing that the Court would have excused the jurors for cause if they had disclosed the omitted responses, Plaintiff's claim that it is

entitled to a new trial because of the nondisclosures of these two jurors on *voir dire* must also fail.[2]

II. CONCLUSION

In accordance with the foregoing, the Court concludes that the evidence in this case was fairly and impartially considered by a fair and impartial jury. It is therefore ORDERED as follows:

1. BankAtlantic's Motion for New Trial on the Basis of Newly Discovered Evidence is DENIED.

2. BankAtlantic's Supplemental Motion for New Trial is DENIED.

3. The Court retains jurisdiction for the purpose of determining the pending motions for attorneys' fees and costs.

DONE AND ORDERED in Chambers at Miami, Florida this 14 day of August, 1990.

/s/ Thomas E. Scott
THOMAS E. SCOTT
United States District Judge

[2] Having failed to meet the *McDonough* criteria, Plaintiff is precluded from making its claim for new trial based on the right of peremptory challenges. *See United States v. O'Neill*, 767 F.2d 780, 786 n.4 (11th Cir. 1985) ("[W]e hold that . . . the defendants' failure to meet the *McDonough* standard precludes the claim based on the right of peremptory challenges."); *Urseth v. City of Dayton*, 680 F. Supp. 1084, 1091 (S.D. Ohio 1987) ("Not remaining viable after *McDonough*, however, is the second ground for a new trial set forth in *McCoy*, to wit: 'a district judge shall presume bias, and grant a new trial, when a juror deliberately conceals information or gave a purposefully incorrect answer.' ").

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 87-6643-CIV-SCOTT

BANKATLANTIC f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FORT LAUDERDALE,
Plaintiffs,

v.

BLYTHE EASTMAN PAINE WEBBER, INC., n/k/a PAINEWEBBER, INC.,
Defendant.

ORDER

[Filed Mar. 8, 1990]

This cause is before the Court upon Plaintiff's Motion for Evidentiary Hearing and for New Trial on the Basis of Newly Discovered Evidence. Plaintiff contends that the jury was improperly influenced by extraneous information during the course of deliberations. Specifically, Plaintiff maintains that at least one member of the jury read a newspaper article published in the *Miami Review* despite the Court's admonitions to the contrary. The article discussed this action as well as the *Borkson* shareholder suit against Plaintiff.

Plaintiff moves pursuant to Federal Rule of Evidence 606(b) for an evidentiary hearing and, ultimately, pursuant to Federal Rule of Civil Procedure 60(b), for a new trial. Generally, under Rule 60(b), Plaintiff is required to establish five elements:

1. the evidence is newly discovered since the final judgment was entered;

2. Plaintiff has exercised due diligence to discover the new evidence;

3. the evidence is not merely cumulative or impeaching;

4. the evidence is material;

5. the evidence is such that it is likely to produce a new outcome if the case were retried.

Taylor v. Texas Corp., 831 F.2d 255 (11th Cir. 1987). The evidence was discovered on February 2, 1990, subsequent to the final judgment entered on November 24, 1989. Plaintiff filed the motion on February 13, 1990. We do not believe that any further diligence by Plaintiff can be reasonably required. As to the third element, evidence that the jury reviewed extraneous materials, by its very nature, cannot be cumulative or impeaching.

Plaintiff need not meet the final two elements of the standard in view of the rebuttable presumption standard provided in *Remmer v. United States*, 347 U.S. 227, 229 (1954).[1] "When jurors consider extrinsic evidence, a new trial is required if the evidence poses a reasonable possibility of prejudice to the [movant]. Prejudice from extrinsic evidence is assumed in the form of a rebuttable presumption and the [nonmovant] bears the burden of demonstrating that the consideration of the evidence was harmless." *United States v. Perkins*, 748 F.2d 1519 (11th Cir. 1984) (citations omitted); *United States v. Bolinger*, 837 F.2d 436 (11th Cir. 1988).[2]

---

[1] Although *Remmer* was a criminal case, the presumption applies equally to civil cases. *See United States v. Harry Barfield Co.*, 359 F.2d 120, 124 (5th Cir. 1966); *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532 (4th Cir. 1986).

[2] We recognize that the Supreme Court appears to have receded somewhat from the *Remmer* presumption, *see, e.g., Smith v. Phillips*,

The Court emphasizes that the presumption of prejudice is not conclusive. Defendant may rebut the presumption with "factors such as the nature of the extrinsic evidence and the strength of the [trial] evidence." *Bolinger*, 837 F.2d at 440. However, in our view, Plaintiff has met its initial burden, and is therefore entitled to an evidentiary hearing to determine whether a new trial is warranted.

Accordingly, it is hereby ORDERED as follows:

1. Plaintiff's Motion for Evidentiary Hearing is GRANTED. The evidentiary hearing will be set by separate order.

2. The Clerk is directed to provide the Court with the names, addresses and telephone numbers of the jurors so that the Court may provide them with notice of the hearing.

3. The hearing will be limited to the objective evidence, *i.e.*, "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." FRE 606(b). The jurors will not be permitted to testify as to whether the extraneous materials affected their decision. *See Perkins*, 748 F.2d at 1534 n.15.

4. All questions will be posed by the Court. However, the Court will consider proposed questions filed by counsel within ten (10) days of this Order. Counsel shall attend the hearing and will be permitted to present oral argument at the close of the testimony.

5. Plaintiff's Motion for New Trial is DEFERRED pending consideration of the jurors' testimony and the

---

455 U.S. 209 (1982). However, the Eleventh Circuit has strictly applied the *Remmer* presumption notwithstanding *Smith*. *See, e.g., Bolinger*, 837 F.2d 436; *Perkins*, 748 F.2d 1519. *Contra Abell v. Potomac Insurance Co.*, 858 F.2d 1104, 1146 (5th Cir. 1988) (*Smith* "no longer assumes jury prejudice").

arguments of counsel to be presented at the evidentiary hearing.

DONE and ORDERED in Chambers at Miami, Florida on this 8 day of March, 1990.

/s/ Thomas E. Scott
THOMAS E. SCOTT
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 87-6643-CIV-SCOTT

BANKATLANTIC f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FORT LAUDERDALE,
Plaintiff,

v.

BLYTHE EASTMAN PAINE WEBBER, INC., n/k/a PAINEWEBBER, INC.,
Defendant.

FINAL JUDGMENT

[Filed Nov. 24, 1989]

Consistent with the jury verdict of November 14, 1989 in favor of Defendant, final judgment is hereby entered in favor of Defendant Blyth Eastman Paine Webber, Inc., n/k/a PaineWebber, Inc., on all claims asserted by Plaintiff BankAtlantic, f/k/a Atlantic Federal Savings and Loan Association of Fort Lauderdale in this cause. The Court retains jurisdiction to assess costs and fees and to enforce the July 10, 1989 Order. This case is CLOSED for all administrative purposes.

DONE and ORDERED in Chambers at Miami, Florida on this 24 day of November, 1989.

/s/ Thomas E. Scott
THOMAS E. SCOTT
United States District Judge

Supreme Court, U.S.
FILED
NOV 30 1992
OFFICE OF THE CLERK

(2)

No. 92-765

in the Supreme Court of the United States

OCTOBER TERM, 1992

BANKATLANTIC,
Cross-Petitioner,

v.

PAINEWEBBER INCORPORATED,
Cross-Respondent.

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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PaineWebber Incorporated

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34 pp

QUESTIONS PRESENTED

1. Whether this Court should invoke its extraordinary supervisory power to review the Eleventh Circuit's affirmance of a district court's rulings on the admissibility of evidence and the permissible scope of closing argument during a jury trial.

2. Whether this Court should invoke its supervisory power to review the Eleventh Circuit's affirmance of a district court's determination that the plaintiff was not entitled to a new trial based upon a single juror's exposure during trial to a "cumulative" and "irrelevant" newspaper article fostered by and quoting plaintiff's counsel.

3. Whether this Court should invoke its supervisory power to review the Eleventh Circuit's affirmance of a district court's determination that, because "a correct response would not have provided a valid basis for a challenge for cause," under *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), the plaintiff was not entitled to a new trial where a juror had failed to volunteer information on *voir dire*.

PARTIES TO THE PROCEEDING

Cross-petitioner and respondent is BankAtlantic, a federal savings bank.

Cross-respondent and petitioner is PaineWebber Incorporated ("PaineWebber").

DESIGNATION OF CORPORATE RELATIONSHIPS

The following is a list of all subsidiaries of PaineWebber, as well as for any of the corporations listed herein:

AIR TRANSPORT LEASING, INC.
AJ CORPORATION
ATL, INC.
BEDCO LEASING COMPANY, INC.
BEPWI SUB, INC.
BLYTH EASTMAN PAINE WEBBER SERVICING INC.
CAPITAL INVESTMENT & TRUST COMPANY
CHANNELVIEW LEASING COMPANY, INC.
CORRESPONDENCE SERVICES CORPORATION
CT MONROE CORPORATION
DEDICATED PARTNERS INC.
EIGHTH INCOME PROPERTIES, INC.
FIFTH INCOME PROPERTIES, INC.
FIFTH MORTGAGE PARTNERS, INC.
FIRST EQUITY PARTNERS, INC.
FIRST INCOME PROPERTIES FUND, INC.
FIRST INSURED MORTGAGE PARTNERS, INC.
FIRST OPPORTUNITY PARTNERS, INC.
FIRST PW CROW PROPERTIES, INC.
FIRST PW GROWTH PROPERTIES, INC.
FIRST QUALIFIED PROPERTIES, INC.
FOURTH DEVELOPMENT FUND, INC.
FOURTH INCOME PROPERTIES, INC.
FOURTH QUALIFIED PROPERTIES, INC.

GENERAL EQUIPMENT MANAGEMENT, INC.
HARBORSIDE INSURANCE COMPANY HOLDINGS INC.
HARBORVIEW CORPORATION
HOMESTEAD SAVINGS, F.S.B.
KATELLA REALTY CORPORATION
MAIDEN LANE LEASING CORPORATION
MEZZANINE CAPITAL CORPORATION
MITCHELL HUTCHINS ASSET MANAGEMENT INC.
MITCHELL HUTCHINS INSTITUTIONAL INVESTORS, INC.
PAINE HORNELL CORPORATION
PAINE WEBBER AIRCRAFT LEASING INC.
PAINE WEBBER (ASIA) LTD.
PAINE WEBBER BERMUDA LTD.
PAINE WEBBER CHAIRMAN'S INC.
PAINE WEBBER DEVELOPMENT, INC.
PAINE WEBBER FUNDING INC.
PAINE WEBBER FUTURES MANAGEMENT CORPORATION
PAINE WEBBER I. B. HOLDINGS INC.
PAINE WEBBER INCORPORATED OF PUERTO RICO
PAINE WEBBER INTERNATIONAL CAPITAL INC.
PAINE WEBBER LEASING CORPORATION
PAINE WEBBER LONDON HOLDINGS
PAINE WEBBER NIPPON LTD.
PAINE WEBBER PROPERTIES INCORPORATED
PAINE WEBBER REAL ESTATE SECURITIES INC.
PAINE WEBBER REALTY INVESTMENTS INCORPORATED
PAINEWEBBER ADVERTISING ASSOCIATES INC.
PAINEWEBBER AIRCRAFT DEPOSITARY INC.

PAINEWEBBER (B.C.) LIMITED
PAINEWEBBER CAPITAL, INC.
PAINEWEBBER COMMODITIES LIMITED
PAINEWEBBER DEPOSITARY CORPORATION
PAINEWEBBER DIAGNOSTIC, INC.
PAINEWEBBER EMPLOYEE INVESTMENTS MANAGEMENT INC.
PAINEWEBBER FINANCIAL TRADING LIMITED
PAINEWEBBER FRANCE SA
PAINEWEBBER GOLF ADMINISTRATOR, INC.
PAINEWEBBER IBD INC.
PAINEWEBBER INCORPORATED
PAINEWEBBER INTERNATIONAL (ASIA) LTD.
PAINEWEBBER INTERNATIONAL BANK LTD.
PAINEWEBBER INTERNATIONAL BANKING CORPORATION
PAINEWEBBER INTERNATIONAL DEVELOPMENT LTD.
PAINEWEBBER INTERNATIONAL FUTURES (ASIA) LTD.
PAINEWEBBER INTERNATIONAL FUTURES LIMITED
PAINEWEBBER INTERNATIONAL (GREECE) LTD.
PAINEWEBBER INTERNATIONAL INC.
PAINEWEBBER INTERNATIONAL (JAPAN) INC.
PAINEWEBBER INTERNATIONAL (LONDON) LTD.
PAINEWEBBER INTERNATIONAL OVERSEAS LIMITED
PAINEWEBBER INTERNATIONAL, S.A.
PAINEWEBBER INTERNATIONAL (U.K.) LTD.
PAINEWEBBER INVESTMENTS HOLDINGS INC.

PAINEWEBBER INVESTMENTS INC.
PAINEWEBBER LIFE HOLDINGS INC.
PAINEWEBBER MORTGAGE
ACCEPTANCE INC. III
PAINEWEBBER MORTGAGE
ACCEPTANCE INC. IV
PAINEWEBBER MORTGAGE FINANCE
HOLDING CO.
PAINEWEBBER MORTGAGE FINANCE, INC.
PAINEWEBBER PARTNERS INC.
PAINEWEBBER PROGRAMMED
AMORTIZATION TERM SECURITIES INC.
PAINEWEBBER SPECIALISTS
INCORPORATED
PAINEWEBBER T.C., INC.
PAINEWEBBER TRADING INC.
PAINEWEBBER UK HOLDINGS
PAINEWEBBER (UK) PENSION TRUSTEES
LIMITED
PAINEWEBBER VENTURE
MANAGEMENT INC.
PW CAPITOL CORPORATION
PW CHAMPLAIN CORPORATION
PW CLOVER HOLDINGS I, INC.
PW CLOVER HOLDINGS II, INC.
PW CLOVER INC.
PW ENTERTAINMENT INC.
PW FAWCETT CORPORATION
PW FITCHBURG CORPORATION
PW FRANKLIN CORPORATION
PW FREMONT CORPORATION
PW GENEVA CORPORATION
PW HAMILTON CORPORATION
PW IDLEWILD CORPORATION
PW INSURANCE AGENCY (ARKANSAS)
INCORPORATED
PW INSURANCE AGENCY OF PUERTO
RICO, INC.

PW INSURANCE AGENCY (OHIO) INCORPORATED
PW INTERNATIONAL INCORPORATED OF PUERTO RICO
PW KATELLA CORPORATION
PW LINCOLN HARBOR INC.
PW MAIN CORPORATION
PW McCULLOUGH CORPORATION
PW NORTHWESTERN CORPORATION
PW PARTNERSHIPS
PW PLAZA CORPORATION
PW SHELTER FUND, INC.
PW SPRING MOUNTAIN CORPORATION
PW TREASURY FUNDING INC.
PW TRUST COMPANY
PW WESTVILLE CORPORATION
PWDC HOLDING COMPANY
PWJC INSURANCE SALES (ARIZONA) INCORPORATED
PWJC INSURANCE SALES INCORPORATED
PWJC INSURANCE SALES (MASSACHUSETTS) INC.
PWJC INSURANCE SALES (MONTANA) INC.
PWJC INSURANCE SALES (WYOMING) INC.
PWJC INSURANCE SERVICES (ILLINOIS) INC.
PWJC SALES AGENCY INCORPORATED
PWPR CORPORATION
REALTY SOUTHWEST INVESTMENT GROUP INC.
REALTY SOUTHWEST INVESTMENT GROUP III INC.
REALTY SOUTHWEST SERVICES INC.
REGIONAL S & L INVESTORS, INC.
RM BRANFORD CORPORATION
RMA INSURANCE CO.
RML LEASING CORPORATION
RMM CORPORATION
RMZ CORPORATION

ROTAN MOSLE ENERGY
DEVELOPMENT INC.
ROTAN MOSLE ENERGY INC.
ROTAN MOSLE FINANCIAL CORP.
ROTAN MOSLE INSURANCE AGENCY, INC.
ROTAN MOSLE INVESTMENTS INC.
ROTAN MOSLE INVESTMENT
VENTURES INC.
ROTAN MOSLE LEASING COMPANY
ROTAN MOSLE REALTY ADVISORS, INC.
ROTAN MOSLE REALTY ASSOCIATES, INC.
ROTAN MOSLE REALTY
INVESTMENTS, INC.
ROTAN MOSLE TECHNOLOGY, INC.
SECOND EQUITY PARTNERS, INC.
SECOND INCOME PROPERTIES, INC.
SECOND PW GROWTH PROPERTIES, INC.
SECOND QUALIFIED PROPERTIES, INC.
SEVENTH INCOME PROPERTIES
SIXTH AVENUE REALTY CORPORATION
SIXTH INCOME PROPERTIES, INC.
THIRD EQUITY PARTNERS, INC.
THIRD INCOME PROPERTIES, INC.
THIRD PW GROWTH PROPERTIES, INC.
THIRD QUALIFIED PROPERTIES, INC.
TRAVEL PLAZA MANAGEMENT, INC.
WALL STREET REALTY CORPORATION
WYODAK CONSTRUCTION CO. INC.

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No. 92-765

In the Supreme Court of the United States

OCTOBER TERM, 1992

BANKATLANTIC,

Cross-Petitioner,

v.

PAINEWEBBER INCORPORATED,

Cross-Respondent.

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

Petitioner and cross-respondent PaineWebber submits this brief in opposition to BankAtlantic's cross-petition for writ of certiorari. The cross-petition presents scandalous and impertinent attacks on the honesty and integrity of the lawyers, jurors, witnesses, and judges involved in this case and does not justify an acknowledgement by this Court much less an exercise of the Court's extraordinary power of supervision.[1]

[1] Accordingly, PaineWebber respectfully suggests, pursuant to Supreme Court Rule 24.6, that BankAtlantic's cross-petition be stricken from court files. *See Cox v. Wood*, 247 U.S. 3 (1918); *Green v. Elbert*, 137 U.S. 615 (1891).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 955 F.2d 1467 (11th Cir. 1992) and is set out in the appendix to PaineWebber's petition at A-3.[2] The Eleventh Circuit's denial of rehearing on July 2, 1992 is included in PaineWebber's appendix at A-1.

The relevant decisions of the district court are the October 27, 1989 memorandum order on admissibility of testimony regarding Alan Levan's business transactions, ownership interests and income from BankAtlantic, App. B; the January 19, 1990 omnibus order denying BankAtlantic's motion for judgment notwithstanding verdict or new trial, A-35-9; the final judgment in the case entered January 26, 1990, A-34; the March 8, 1990 order setting an evidentiary hearing regarding juror misconduct, App. D; and the August 14, 1992 order denying BankAtlantic's motion for new trial and supplemental motion for new trial, App. C.

REGULATIONS INVOLVED

BankAtlantic omits the following rules and regulations relevant to the disposition of its petition:

Local Rule 21A(7) of the United States District Court, Southern District of Florida states:

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[2] References to "A — " are to the petitioner/cross-respondent PaineWebber's appendix in the related case before this Court, case no. 92-571. References to "App. " are to cross-petitioner BankAtlantic's appendix in this case.

RULE 21. RELEASE OF INFORMATION IN CRIMINAL AND CIVIL PROCEEDINGS

A. By Attorneys.

7. A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will interfere with a fair trial and which relates to:

a. Evidence regarding the occurrence or transaction involved.

b. The character, credibility, or criminal record of a party, witness, or prospective witness.

c. The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

d. His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

e. Any other matter reasonably likely to interfere with a fair trial of the action.

Rule 4-3.6 of the Rules Regulating the Florida Bar states:

RULE 4-3.6 TRIAL PUBLICITY

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should

know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding. A lawyer shall not counsel or assist another person to make such a statement. Prosecutors and defense counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a criminal case from making extrajudicial statements that are prohibited under this rule.

STATEMENT OF THE CASE

I. BACKGROUND

BankAtlantic's statement of the case is wholly argumentative, replete with irrelevant and scandalous matter, and does not accurately set forth the facts. PaineWebber, as obligated under the rules of this Court, sets out below a corrected statement of all material facts.

PaineWebber is a financial services company incorporated and located in New York. BankAtlantic is a federal savings and loan association located in Fort Lauderdale, Florida. At the time of this litigation, BankAtlantic was one of the largest savings and loan institutions in Florida and in the United States. A-9.

In 1984, BankAtlantic retained PaineWebber as a financial advisor and to assist it in blocking several hostile takeover attempts. A-9, 105-110. One such takeover attempt was led by Alan Levan, BankAtlantic's present chairman of the board and chief executive officer. R 60-667-(21,31); R 63-670-17. PaineWebber was successful in defending BankAtlantic from Levan's takeover attempt. R 60-667-70.

During this time, BankAtlantic also contacted a number of brokerage houses to broker interest rate swaps on its

behalf. R 49-656-(40-42); R 56-663-30.[3] Interest rate swaps were recommended by the Federal Home Loan Bank Board as a prudent tool to assist savings and loans in managing interest rate risk. R 49-656-(83-85, 87); R 63-670-(248-249); R 64-671-51.

BankAtlantic entered into two interest rate swaps with Homestead Savings & Loan Association of California. A-9-10, 92, 111-130. PaineWebber was the broker in the two swaps. A-9.

BankAtlantic, claiming nonperformance under the advisor agreement, terminated the services of PaineWebber as its financial advisor and employed another firm to assist with the swaps. A-10. At this time, interest rates were falling drastically allegedly causing BankAtlantic to suffer losses on the swaps in excess of $30 million. A-10, 93.

After PaineWebber was terminated, Alan Levan, one of the corporate raiders PaineWebber was hired to keep out, gained control of BankAtlantic. BankAtlantic's cross-petition at 6 n.3. In August 1987, BankAtlantic, under Levan-led management, sued PaineWebber claiming losses caused by PaineWebber's failure to disclose risks involved in interest rate swaps. A-10. The complaint alleged breach of the financial advisor contract, breach of fiduciary duty, fraud, fraudulent concealment, negligence and negligent misrepresentation. *Id.*

Specifically, BankAtlantic claimed it purchased the interest rate swaps to guard, or "hedge," against rising interest rates. A-89-90. BankAtlantic alleged that PaineWebber failed to adequately warn that, if interest rates

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[3] An interest rate swap is an agreement by which one party agrees to pay the counter-party a fixed rate of interest on a notional amount for a specified period of time. In return, the counter-party agrees to pay the first party an adjustable rate of interest on the same notional amount for the same period of time.

fell, the high-yielding fixed rate mortgages to which the swaps were matched would prepay. A-10, 90-91.

Further, BankAtlantic contended that PaineWebber failed to disclose its extensive relationship with Homestead or that Homestead was not creditworthy. Therefore, BankAtlantic should have been advised to obtain collateral from Homestead.[4] A-10, 92. The absence of collateral, BankAtlantic claimed, made the swaps unsalable in the secondary market.

II. THE EVIDENCE AT TRIAL

Although BankAtlantic alleged that it incurred "staggering" losses, substantial evidence was adduced during the five week jury trial that there was no loss, damage or injury. BankAtlantic's chief financial officer, Herbert Stangl, testified that BankAtlantic suffered no loss as a result of the swaps. R 58-665-(62-63, 66-69). He stated that BankAtlantic's loss was "zero," as reflected in the bank's published consolidated financial statements. *Id.* Those financial statements noted that the effect of the interest rate swaps was

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[4] BankAtlantic argues as fact that a hidden relationship between Homestead and PaineWebber existed which was so significant that PaineWebber and its former counsel withheld documents to prevent its disclosure. This same claim of hidden documents led to a Fed.R.Civ.P. 37 sanction against PaineWebber and its former counsel.

At trial, when it became clear that BankAtlantic was well aware of PaineWebber's relationship with Homestead, A-13, R 45-652-214, R 56-663-(72-73), BankAtlantic took the position that these documents were "irrelevant and did not add anything to the case." R 61-668-200. In truth, the "irrelevant" documents supposedly hidden did not belong to PaineWebber and were never properly requested. The propriety of the Rule 37 order which is prominently featured by BankAtlantic is presently before the Eleventh Circuit, not this Court.

"insignificant." Def. Exh. 319 at 31. In explaining why there was no loss, Stangl testified:

Q. Why is there no loss, sir?

A. Well, the accounting assumption is that there are assets of equal value to offset the rate swap in the same dollar amount and that movement in the interest rates would affect both sides equally.

Q. Isn't it a fact, sir, the interest payments that Atlantic Federal might have made to the counter party to Homestead only represent the expense side of that equation?

A. Yes, sir.

Q. And there is another side to the equation; correct, sir?

A. Yes.

Q. That is the mortgage side, that is the income side?

A. That's correct.

R 58-665-67.[5]

Substantial evidence was also introduced to support the jury's eventual finding that there was no breach of fiduciary duty, negligence or fraud by PaineWebber with regard to the two interest rate swaps. BankAtlantic's own management testified that the allegedly undisclosed risks — that interest rates fluctuate and mortgages prepay — were well known to BankAtlantic and thoroughly discussed. A-13; *see, e.g.*, R 45-652-(174-180); R 47-654-41; R 49-656-8;

[5] Following Stangl's testimony, BankAtlantic withheld Stangl's pension benefits. R. Supp. 5-799-6. BankAtlantic then sued Stangl in retaliation for allegedly disclosing "trade secrets" by testifying in this case. *Id.*

R 58-665-(32, 37).[6] In addition, PaineWebber's witnesses testified that the risks were in fact disclosed and discussed. R 56-663-(40-42, 62-63).

Donald Streeter, the president and chairman of the board of BankAtlantic at the time the swaps were entered (and BankAtlantic's first witness), testified that BankAtlantic was well aware of these risks. A-13. Streeter testified that he and Gerald Roberts, BankAtlantic's senior vice-president, discussed all possible scenarios with respect to the interest rate swaps. *Id.*; R 45-652-174. A full presentation was made to BankAtlantic's board of directors in January 1984 at which the board considered all possibilities, including the effect on BankAtlantic of rising and falling interest rates, both with and without interest rate swaps in place. A-13; R 45-652-(175-80).

There also was substantial evidence to refute BankAtlantic's claim that Homestead was an uncreditworthy swap partner and that PaineWebber should have advised BankAtlantic to obtain collateral from Homestead. A-13. The chairman of the board of Homestead, Lawrence Weissberg, testified that Homestead had been in

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[6] In a September 1983 offering circular for the sale of its stock to the public, BankAtlantic stated that if interest rates went up, mortgage prepayments would decrease, and that if interest rates went down, mortgage prepayments would increase. Def. Exh. 187 A at 18. BankAtlantic's offering circular disclosed that the average life of its 30-year mortgages had been only seven to ten years. *Id.*; R 63-670-(73-74).

business for over 100 years and that it continued to be profitable throughout the 1980s. *Id.*; R 62-669-23. As Weissberg stated, any suggestion that Homestead was not creditworthy was "ridiculous." *Id.*[7]

In addition, Jim Hunter, BankAtlantic's chief investment officer, and Walid Chammah of PaineWebber, testified that it was BankAtlantic which refused to enter into a collateralized swap. A-13-14; R 50-657-47; R 56-663-(45-46). Streeter, BankAtlantic's president, also testified that no one at BankAtlantic ever felt collateral was needed. A-14; R 45-652-(218-19).

BankAtlantic's final charge was that the failure to secure collateral from Homestead exposed BankAtlantic to an unnecessary risk because the swap transactions were "unsalable in the secondary market." The evidence established that in September 1984 BankAtlantic could have made a one million dollar profit by accepting Citibank's offer to purchase the swaps, but BankAtlantic refused the offer because the amount was "not enough." R 59-666-36.

III. THE JURY VERDICT AND POST TRIAL PROCEEDINGS

A. BankAtlantic's First New Trial Motion: Levan's Financial Interest

On November 13, 1989, after a five-week trial, the jury returned a verdict in favor of PaineWebber. A-10, 40. On December 8, 1989, not waiting for the entry of the final judgment which occurred on January 26, 1990, A-34,

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[7] BankAtlantic also asserted that PaineWebber failed to disclose its prior relationship with Homestead. Streeter, BankAtlantic's president, admitted, however, that in February 1984 PaineWebber disclosed that it had recently brokered a $125 million CD offering for Homestead. A-13; R 45-652-214. Walid Chammah, of PaineWebber, also testified that he told BankAtlantic that PaineWebber had previously brokered several interest rate swaps to which Homestead was a party. R 56-663-(72-73).

BankAtlantic filed its first motion for new trial pursuant to Fed.R.Civ.P. 50 and 59. R 35-687; R 37-697.

BankAtlantic's motion charged PaineWebber and its counsel with jury tampering, subornation of perjury, and flat out "lying." R 35-687. BankAtlantic's eighty-five page memorandum, however, argued weight of the evidence, that the district court had erred by allowing PaineWebber to question BankAtlantic's chairman of his income from the bank, and that the court had erred in allowing PaineWebber to refer to that testimony in closing, despite the lack of objections at the time. R 37-697.

The district court denied BankAtlantic's motion in an order dated January 19, 1990.[8] A-35. With respect to BankAtlantic's claim of error in allowing evidence of financial interest, the district court noted that the issue had been fully briefed several times and that it had "afforded *both* parties great latitude in submitting evidence for consideration to the jury." A-36 (emphasis added). Accordingly, the court stood by its previous ruling that the financial interest evidence was proper under the authority of *Davis v. Alaska*, 415 U.S. 308 (1974). *Id.*

Finally, the district court absolutely disagreed with BankAtlantic's contention that PaineWebber's closing argument was improper: "In particular, we disagree with Plaintiff's characterization of Defendant's closing argument and therefore reject this argument as grounds for post-trial relief." A-37 n.3.

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[8] The court denied BankAtlantic's weight of the evidence argument holding that considering all of BankAtlantic's arguments and the full record of trial and pretrial proceedings, the "cause presented the classic dispute for trial by jury. The parties introduced substantial evidence from which the jury reasonably found for Defendant. It is not for the Court to second-guess the jury's resolution of factual issues." A-36.

B. BankAtlantic's Newspaper Article

During trial, a newspaper article entitled "A Big Week for BankAtlantic" was published in the *Miami Review*. R 39-736-Exh. B. The article reports primarily on a suit between BankAtlantic and a minority shareholder.

The sole contributors to the article are BankAtlantic, its counsel, and experts who explain that BankAtlantic "has got many good things going for it," "doesn't display the classic danger signs of an endangered thrift," and "[a] lot of institutions would kill to have [numbers] like [BankAtlantic's]." *Id.* BankAtlantic's counsel, Eugene Stearns, is quoted as stating that any problems BankAtlantic does have are in part a result of its "having to overcome the obstacle of" the $30 million fraud allegedly perpetrated by PaineWebber. *Id.* The article never presents PaineWebber's version.

Immediately after BankAtlantic's article hit the newsstands, PaineWebber filed a motion to sanction BankAtlantic and its counsel for participating in such an article during trial, in disregard of all published rules of professional conduct. BankAtlantic's cross-petition at 14; R 66-673-2. PaineWebber then requested the court to inquire of the jurors' exposure to the article and to provide the appropriate instruction. *Id.*

C. BankAtlantic's Second and Third New Trial Motions: Jury Misconduct

On February 13, 1990, pursuant to Fed.R.Civ.P. 60(b)(2), and on the ground of "newly discovered evidence," BankAtlantic served its second motion for new trial arguing that the jury had purportedly read its newspaper article which now was prejudicial to BankAtlan-

tic.[9] The district court, pursuant to the rule of *Smith v. Phillips*, 455 U.S. 207 (1982) and *Remmer v. United States*, 347 U.S. 227 (1954), interviewed each juror and held an evidentiary hearing. App. 38a.

Seven of the eight jurors repeatedly and emphatically denied learning anything about BankAtlantic's article. R Supp. 4-761-(8-9, 11-13, 14-16, 18-21, 22-24, 28-30, 31). Only one juror had *any* knowledge of the substance of BankAtlantic's article during trial.

This juror, Anthony Lippert, "glanced at" the article and decided it had nothing to do with this case. *Id.* at 34-35, 40. No juror discussed the substance of the article, and no juror, other than Lippert, learned anything of its contents.[10] *Id.* at 8-32. the article had no effect on any juror's deliberations. *Id.* at 9, 13, 16, 20-21, 25-26, 30, 32.

On April 16, 1990, while the court considered BankAtlantic's newspaper article motion for new trial,

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[9] BankAtlantic misrepresents to this Court that it did not learn a juror had become exposed to its article until another article was published by the *Miami Review* on February 5, 1990. Mr. Stearns has previously sworn in court that he had discussions with the *Miami Review* throughout the case *and* that he learned from the *Miami Review* of juror Lippert's exposure to the first article on February 2, 1990. App. 38a; R 39-736-Exh. C.

Despite learning of this information seven days prior to the last date for filing a Rule 59(b) motion for new trial, BankAtlantic allowed the time for a Rule 59 motion to expire, and filed a Rule 60(b)(2) motion on February 13, 1990. R 39-736. Rule 60(b)(2), however, is jurisdictionally limited to newly discovered evidence which could not have been discovered before the time for filing a Rule 59 motion has expired. Fed.R.Civ.P. 60(b)(2).

[10] Lippert saw the article at an office where he uses space. According to BankAtlantic, the office is owned by an attorney who attended the University of Miami Law School beginning a year earlier than one of PaineWebber's attorneys. BankAtlantic's repeated charges that this attorney therefore was a "classmate" of PaineWebber's counsel who deliberately influenced juror Lippert against BankAtlantic are frivolous.

BankAtlantic scoured the public records and filed yet a third motion for new trial, pursuant to Fed.R.Civ.P. 60(b)(2). BankAtlantic claimed that juror Lippert had lied on *voir dire* by not volunteering that he had a real estate license.[11] R Supp. 4-766A, 766B.

Juror Lippert was retired after twenty-two years as an engineer for AT&T. Lippert also held a license to sell real estate. On *voir dire*, Lippert was asked by the court: "What is your occupation?" He replied: "Recently retired from AT&T." R 44-651-35. Although BankAtlantic had considered asking the jurors whether they held a real estate license, R 29-581-6, it did not do so.

On August 14, 1990, the district court denied BankAtlantic's second and third motions for new trial. App. C. The court determined that (1) only one of the eight jurors deliberating had read the article; (2) the jury never discussed the substance of the article; (3) none of the jurors, save the one who had read it, had any knowledge of the article's substance; (4) the juror who had read the article believed it had nothing to do with the case; and (5) the article contained nothing prejudicial to BankAtlantic.[12] Accordingly, the district court held that not even a "reasonable possibility of prejudice to Plaintiff" existed. App. 34a.

The district court applied the standard enunciated in *McDonough Power Equipment, Inc. v. Greenwood*,

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[11] In this third motion, BankAtlantic also argued that another juror had lied, by not revealing a default judgment for $642.73 and misdemeanors on *voir dire*. R Supp. 4-766A-(7-8). That ground is not raised here.

[12] In its cross-petition, BankAtlantic misrepresents that the district court had excluded some information within the newspaper article expressly due to its "prejudicial" nature. BankAtlantic has already been twice rebuked for making such statements when in fact the district court had specifically excluded the information because it "was irrelevant, not because it was prejudicial." A-17; App. 33a.

464 U.S. 548 (1984), in denying BankAtlantic's demand for a new trial, on the ground that juror Lippert allegedly gave an untruthful answer on *voir dire*.[13] The court assumed for the purposes of BankAtlantic's motion that the juror's answer had been dishonest. App. 34a-35a. Following *McDonough*, the district court held that BankAtlantic could not receive a new trial because even a correct response by juror Lippert would not have supported a challenge for cause. *Id.*

IV. THE ELEVENTH CIRCUIT'S OPINION

BankAtlantic brought up on appeal to the Eleventh Circuit the same arguments it made below and which it now claims justify the extraordinary intervention of this Court. On March 23, 1992, the Eleventh Circuit rendered its opinion. A-3.

The Eleventh Circuit, in affirming each of the district court's rulings denying BankAtlantic a new trial, "methodically"[14] examined the entire "voluminous record," the appropriate standards of review, and the appropriate legal tests for the issues raised.[15] Reviewing BankAtlantic's assertions

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[13] *McDonough*, 464 U.S. 548, established the standard for granting a new trial in cases where pertinent information was not disclosed on *voir dire*. The test is two-pronged, "a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556.

[14] BankAtlantic's claim that the Eleventh Circuit participated in a criminal conspiracy against it is two-faced. Here, BankAtlantic argues conspiracy. Meanwhile, in BankAtlantic's most recent filing before the Eleventh Circuit, BankAtlantic attempts to uphold the erroneous Rule 37 sanction mentioned, *supra*, by telling the court that it was correct in "methodically affirm[ing] each and every ruling of the district judge." BankAtlantic's brief in opposition to PaineWebber's appeal to overturn Rule 37 sanction, case nos. 91-5613, 91-5919, at 23 n.8.

[15] BankAtlantic, below and in its cross-petition to this Court, fails to mention the appropriate standards of review and legal prerequisites of its claims.

of attorney misconduct — the financial interest evidentiary rulings of the trial judge and PaineWebber's consequent closing argument — the Eleventh Circuit noted it could "not disturb a district court's rulings absent a clear showing of an abuse of discretion." A-20 (citations omitted).

The court further noted that the "trial judge is given broad discretion in controlling counsel's arguments. Absent an abuse of discretion, the decision of the trial court which has had the opportunity to hear the offensive remarks within the context of the argument and to view their effect on the jury, should not be disturbed." *Id.* (quotation omitted).

Reviewing the record, the Eleventh Circuit determined that the testimony elicited from Levan, and PaineWebber's closing argument comments about that testimony, were directly relevant to PaineWebber's defense and also show Levan's "bias or interest in the outcome of the case." A-21-22. Specifically, the evidence and references to Levan's income and dividend payments supported PaineWebber's claim that "Levan and his associates consciously sold the mortgages matched in the interest rate swaps." A-21.

The court quoted this Court's opinion in *Davis v. Alaska*, 415 U.S. 308, 316 (1974), and held that the evidence about Levan was proper because it was relevant to PaineWebber's defense, and "[t]he partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony." A-22.

The court held that the closing arguments were also proper because "they did not appear to be references to matters outside the record. Rather, PaineWebber's closing argument was based on evidence that was largely adduced from BankAtlantic's own witnesses." A-21.

The Eleventh Circuit was similarly methodical as to BankAtlantic's claim to a new trial on the ground a juror

had read BankAtlantic's newspaper article. The Eleventh Circuit first recognized that "[t]he factual determination of whether consideration of extrinsic evidence caused the defendant prejudice is committed to the trial court's 'large discretion.'" A-15 (quoting *Marshall v. United States*, 360 U.S. 310, 312 (1959) and *United States v. Rowe*, 906 F.2d 654, 656 (11th Cir. 1990)).

The court then determined that the trial evidence, along with the jurors' post-trial testimony, supported the district court's determination that BankAtlantic was not prejudiced. A-17. Accordingly, the Eleventh Circuit held that "the district court did not abuse its 'large discretion' in concluding that the juror's consideration of the extrinsic evidence did not taint the jury's deliberations and require a new trial." *Id.* (citation omitted).[16]

Finally, the Eleventh Circuit dismissed BankAtlantic's claim premised on a purported false answer by juror Lippert to a question on *voir dire*. The court agreed with the district court that it was unnecessary to determine whether juror Lippert had been honest and that *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), was controlling. Because a truthful answer would not have given rise to a challenge for cause or shown "actual bias," the district court did not abuse its discretion in denying the motion for new trial. A-19.

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[16] The Eleventh Circuit applied *United States v. Rowe*, 906 F.2d 654 (11th Cir. 1990) and *United States v. Bolinger*, 837 F.2d 436 (11th Cir.), *cert. denied*, 486 U.S. 1009 (1988), which in turn specifically adopt and apply the holdings of this Court in *Smith v. Phillips*, 455 U.S. 207 (1982), *Sheppard v. Maxwell*, 384 U.S. 333 (1966), *Marshall v. United States*, 360 U.S. 310 (1959), and *Dennis v. United States*, 339 U.S. 162 (1950), on whether jurors' exposure to extraneous influences during trial require a new trial.

SUMMARY OF ARGUMENT

BankAtlantic, as it has done throughout, puts the blame for the adverse verdict on others instead of on the failure of its case. This time, BankAtlantic says it was done in by a criminal conspiracy involving PaineWebber's counsel, the entire jury led by a renegade foreman, a district court judge whose "imminent departure from the bench . . . caused him to lose enthusiasm for pursuing the wrongdoing," and the Eleventh Circuit which became a willing participant because the judge who wrote the panel's opinion was "a senior member of the same district court as the trial judge in this case." BankAtlantic's cross-petition at 16.

BankAtlantic charges that the combined jury and attorney misconduct, in which the trial judge and the Eleventh Circuit joined, renders the denial of a new trial so unfair as to constitute a departure from the accepted and usual course of judicial proceeding and calls for an exercise of this Court's power of supervision.

BankAtlantic's petition presents no issue arguably deserving of this Court's time. Despite BankAtlantic's scandalous and impertinent accusations, the only real issues raised are typical evidentiary, factual and legal rulings made during the course of any jury trial. Each ruling was correctly decided by the district court and affirmed by the Eleventh Circuit applying Supreme Court precedent.

There is no secret conspiracy against BankAtlantic. The Eleventh Circuit and district court have not abused their broad discretion. In no event has a departure from the usual course of proceedings occurred. BankAtlantic's cross-petition should be denied.

ARGUMENT

I. JUROR MISCONDUCT

BankAtlantic barrels with abandon through its juror misconduct arguments as if no court had ever addressed these issues. As PaineWebber, the district court and Eleventh Circuit have repeatedly reminded BankAtlantic, however, its shrill rhetoric cannot defeat binding precedent.

For example, BankAtlantic argues that the district court and Eleventh Circuit erred by determining that juror Lippert's purportedly false answer to a question on *voir dire* does not entitle BankAtlantic to a new trial. BankAtlantic makes this argument despite the fact that both the district court and Eleventh Circuit *assumed* that the juror's *voir dire* answer was false but held that the test set out by this Court in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984) required a finding that BankAtlantic was not entitled to a new trial. BankAtlantic does not cite *McDonough* or bring it to this Court's attention. *McDonough* was correctly followed.

BankAtlantic's cry of manifest injustice is even less appropriate with regard to its claim to a new trial based on the jury's purported exposure to a newspaper article participated in and quoting none other than BankAtlantic's own trial counsel, Eugene Stearns. Surprisingly, this contention takes up most of BankAtlantic's discussion of why this Court should accept its cross-petition. Basically, BankAtlantic claims that in this case, the Eleventh Circuit, not for the first time, "has completely overlooked the express provisions of [Fed.R.Evid.] Rule 606(b)" by permitting a district court to consider testimony of a juror that extrinsic information was harmless. BankAtlantic's cross-petition at 19.

Again, BankAtlantic fails to tell this Court that the district court's evidentiary hearing and questions of the jurors specifically follow the teachings of this Court in *Smith*

v. Phillips, 455 U.S. 207 (1982), and *Remmer v. United States*, 347 U.S. 227 (1954), including that a juror is "well qualified to say whether he has an unbiased mind" after having been exposed to an extraneous influence that might theoretically affect his vote.[17] *Smith v. Phillips*, 455 U.S. at 217 (quoting *Dennis v. United States*, 339 U.S. 162, 171 (1950)). BankAtlantic does not cite these cases at all.[18]

Moreover, in the case at bar, the district court's decision and the Eleventh Circuit's affirmance did not even turn on the objected to juror testimony. The basis for the rulings was the determination that the newspaper article quoting BankAtlantic's counsel was merely cumulative and irrelevant, rather than prejudicial, and that only one juror was exposed to the substance of this article. A-16-17; App. 33a. Accordingly, whether the district court was allowed under Federal Rule of Evidence 606(b) to consider the jurors' testimony had no effect on BankAtlantic's entitlement to a new trial.

Recognizing this deficiency in its argument, BankAtlantic boldly misrepresents that the information within the article was excluded from evidence at trial expressly because it was "prejudicial." BankAtlantic's cross-petition at 13. The district court and Eleventh Circuit, in

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[17] In *Smith v. Phillips*, 455 U.S. 207, this Court rejected the same argument that BankAtlantic makes here. As this Court stated, "[r]espondent correctly notes that determinations made in *Remmer*-type hearings will frequently turn upon testimony of the juror in question, *but errs in contending that such evidence is inherently suspect.*" *Id.* at 217 n.7 (emphasis added).

[18] Even *Mattox v. United States*, 146 U.S. 140 (1892), which BankAtlantic does cite, supports the decisions rendered below. There, the Court quoted *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1852), where it was held that no new trial could be had where "[t]here was nothing in the newspapers calculated to influence [the jurors'] decision, and both of them swear that these papers had not the slightest influence on their verdict." *Id.*

response to this same misrepresentation BankAtlantic made twice before held that the information was excluded expressly because it was "irrelevant," *not* prejudicial. A-17 n.4; App. 33a.

The Eleventh Circuit, relying on this Court's decision in *Marshall v. United States*, 360 U.S. 310 (1959), and *United States v. Rowe*, 906 F.2d 654 (11th Cir. 1990), properly held that the "factual determination of whether consideration of extrinsic evidence caused the defendant prejudice is committed to the trial court's 'large discretion.'" A-15. BankAtlantic cannot in good faith argue that the district court abused its discretion in making these findings and that the great weight of the evidence was to the contrary. The district court and Eleventh Circuit clearly did not depart from the accepted course of proceedings.[19]

II. ATTORNEY MISCONDUCT

BankAtlantic asserts it is entitled to a new trial because of "attorney misconduct" consisting of "attacks" on BankAtlantic's chairman, Alan Levan, on direct examination and during closing argument. In reality, there is nothing in the record which plausibly could be called "attorney misconduct."

BankAtlantic actually complains of an evidentiary ruling by the district court. The district court and the Eleventh Circuit held, on the basis of this Court's decision, *Davis v. Alaska*, 415 U.S. 308 (1974), that PaineWebber was entitled to question witness Levan about his bias and financial interest in the outcome of the case. A-21-22; App. 26a-27a.

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[19] Additionally, although not addressed by the Eleventh Circuit, because BankAtlantic concededly discovered the ground for this motion for new trial on "newly discovered evidence" prior to the expiration of the time for it to file a Fed.R.Civ.P. 59 motion, R Supp. 3-743A-4; 3-746-(1-2), the district court lacked the jurisdiction to consider BankAtlantic's Fed.R.Civ.P. 60(b)(2) motion. *See* Fed.R.Civ.P. 60(b).

Again, BankAtlantic does not mention the controlling and relied upon Supreme Court decision.[20]

In short, the alleged "attorney misconduct" consists entirely of questions asked by PaineWebber directly relevant to its defense, and references to the answers in closing argument.[21] Plainly, the Eleventh Circuit was well within its broad discretion in denying BankAtlantic's motion for new trial on this ground.

III. ORCHESTRATED MISCONDUCT

Finally, there is BankAtlantic's new claim, that PaineWebber's counsel "orchestrated" all of the purported attorney and jury misconduct — that PaineWebber planted BankAtlantic's newspaper article and then pandered to the jury in closing argument, knowing that the jury had become predisposed against BankAtlantic. Not to mention that the district court and Eleventh Circuit joined in this criminal conspiracy and "demonstrated little concern about the egregious and intentionally orchestrated attorney and jury misconduct. . ." BankAtlantic's cross-petition at 2 n.1.

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[20] BankAtlantic also fails to mention the leeway evenly granted to both parties at closing argument. For example, BankAtlantic's counsel referred to PaineWebber's representatives as "snake oil salesmen" and appealed to the jury's prejudice by suggesting that PaineWebber was responsible for the decline in America's might at the hands of the Japanese. R 66-673-(64, 76, 142). He even attacked PaineWebber's counsel personally, calling PaineWebber's counsel's argument "stupid." R 66-673-138.

[21] The district court and Eleventh Circuit agreed that the testimony elicited was directly relevant to PaineWebber's defense, including that Levan and his people consciously sold the mortgages matched against the interest rate swaps to create profits justifying the amounts they had taken out of the bank. A-21-22; App. 27a. PaineWebber's closing argument, moreover, only referenced matters within the record, and "was based on evidence largely adduced from BankAtlantic's own witnesses." A-21.

Not a scintilla of evidence exists to support BankAtlantic's libelous accusations. Indeed, the uncontroverted facts in the record are that the article was promoted by Eugene Stearns, counsel for BankAtlantic, who is quoted in the article extensively. R 39-736-Exh. B.

PaineWebber, as soon as the article hit newsstands, filed a motion to sanction BankAtlantic and its counsel for participating in such an article during trial in violation of all published rules of professional conduct. R 66-673-2; *see* United States District Court, Southern District of Florida, Local Rule 21A(7); Rules Regulating the Florida Bar, Rule 4-3.6. PaineWebber then requested the court to inquire of the jurors' exposure to the article and to provide the appropriate instruction.

BankAtlantic's claim of injustice premised on its own misconduct turns all traditional notions of justice upon their collective heads. Except as an occasion to sanction BankAtlantic, this coffee table petition intended only to assuage the ego of BankAtlantic's chairman, Alan Levan, should not be accepted by this Court.

CONCLUSION

For the reasons stated herein, cross-respondent PaineWebber requests that this Court deny BankAtlantic's cross-petition seeking review of the jury verdict and opinion and judgment of the United States Court of Appeals for the Eleventh Circuit. It is further suggested that BankAtlantic's petition be stricken from court files due to its scandalous and impertinent nature.

Respectfully submitted,

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On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF CROSS-PETITIONER

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* The parties to this proceeding and a designation of corporate relationships were set forth in BankAtlantic's Cross-Petition For Writ Of Certiorari at pages ii-v.

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REPLY BRIEF OF CROSS-PETITIONER

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1. PAINEWEBBER, ITS COUNSEL, AND THE JURY FOREMAN ARE RESPONSIBLE FOR THE MISCONDUCT IN THIS CASE.

PaineWebber grossly overstates BankAtlantic's case. BankAtlantic does not challenge the honesty and integrity of the judges or of most of the lawyers, jurors, and witnesses in this case. *See* Brief in Opposition at 1. BankAtlantic makes no claim that either the district court or the Eleventh Circuit joined in a "criminal conspiracy." *Id.* at 21. PaineWebber's exaggeration of BankAtlantic's position is simply a crass attempt to make it appear extreme and, thus, lacking in credibility.

BankAtlantic has very carefully and very specifically identified PaineWebber and its trial counsel, with the

assistance of the jury foreman, as the persons directly involved in the intentional misconduct in this case. Others likely facilitated this relatively sophisticated misconduct, perhaps unknowingly, but BankAtlantic has very narrowly delineated the primary wrongdoers and their wrongs.

Moreover, the orchestrated misconduct by PaineWebber, its counsel, and the jury foreman in this case is not a "new claim" as asserted by PaineWebber in its brief. Brief in Opposition at 21. Even while this case was still before the district court, BankAtlantic had demonstrated the basic elements of this coordinated misconduct: the previously concealed link between PaineWebber's counsel and the jury foreman; use of the link to provide the jury foreman with prompt access to a highly prejudicial newspaper article containing accusations and extraneous information about BankAtlantic and its chairman (including the information specifically excluded from evidence during trial); *sub silentio* use in PaineWebber's closing arguments of the accusations and extraneous information contained in the newspaper article read by the jury foreman (and, at the very least, seen by other jurors) on the same day as closing arguments; the related scurrilous attack PaineWebber had maintained against BankAtlantic's chairman throughout the trial; and a post-verdict conversation between the jury foreman and trial counsel for PaineWebber leading immediately to the jury foreman telling a newspaper reporter that he thought BankAtlantic's entire case was frivolous. All of this was also fully explained to the Eleventh Circuit on appeal.[1]

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[1] PaineWebber claims that BankAtlantic should have included the information about juror misconduct in a Rule 59(b) motion and filed it prior to February 5, 1990, rather than raising the juror misconduct in a Rule 60(b) motion filed on February 13, 1990. Brief in Opposition at 9-10, 12 n.9, and 20 n.19. PaineWebber neglects to inform this Court, however, that the judgment adverse to BankAtlantic was entered on November 24, 1989, and that the

Very significantly, PaineWebber has never—not in any pleading, brief, paper, or otherwise—denied the existence of a link between its counsel and the jury foreman or the fact that the jury foreman obtained the newspaper article with the extraneous and prejudicial information from the intermediary just before closing arguments. Despite repeated opportunities (indeed, encouragement by BankAtlantic) throughout this case to deny any connection and influence, PaineWebber has very carefully avoided such a denial. Nor has PaineWebber ever denied that it utilized the themes of the article in its closing argument, that it did attack Alan Levan throughout the trial in a manner to which the article offers substantial support, and that its counsel did have a post-verdict conversation with the jury foreman. Instead, PaineWebber has repeatedly attempted, as in this Court, to mock BankAtlantic's arguments by exaggeration in an attempt to mask PaineWebber's own refusal to deny its improper influence over the jury foreman and its use of the newspaper article to shape the outcome of the jury verdict.

The heart of the problem in this case is that both the district court and the circuit court, following traditional reluctance to closely examine jury misconduct in any but the most blatant of cases, would not allow BankAtlantic use of discovery tools necessary to formally prove the existence and scope of the more sophisticated form of misconduct by PaineWebber, its counsel, and the jury foreman. As BankAtlantic noted in its cross-petition, lawyers have in recent years become much more subtle and skilled in their abilities to influence both the media

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second judgment entered on January 26, 1990, did not in any way affect the November 24, 1989, judgment. The second judgment was in favor of BankAtlantic on PaineWebber's counterclaim for indemnification and was entered on PaineWebber's motion to allow for appeal. Under Rule 59, therefore, BankAtlantic was required to file its motion for new trial long before it learned of the juror misconduct. *See Cornist v. Richland Parish School Board*, 479 F.2d 37 (5th Cir. 1973).

and juries. Cross-Petition at 20. Greater effort is, therefore, required to demonstrate that misconduct has in fact taken place. Federal courts, however, have thus far shown a reluctance to confront this reality and either conduct or allow probing inquiry in the more complex cases of misconduct such as in the present case.

2. NEITHER BANKATLANTIC NOR ITS COUNSEL "FOSTERED" THE NEWSPAPER ARTICLE READ BY THE JURY FOREMAN.

PaineWebber accuses counsel for BankAtlantic, Eugene Stearns, of "fostering" the prejudicial newspaper article read by the jury foreman and, likely, other jurors in this case. Brief in Opposition at i, 11, 18, 22. The accusation is both false and illogical.[2]

When PaineWebber made this accusation in the district court, Stearns filed an extensive affidavit explaining that he did not initiate the article and that, in fact, he spoke with the reporter solely in an attempt to have publication of the story delayed until after the jury returned its verdict. R39-736-Exhibit C. In the affidavit, which PaineWebber has never even attempted to rebut, Stearns explained:

> 2. During the last several days of the trial of this cause I received a message of a call from a reporter from the *Miami Review*, Peter Katel. The message

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[2] PaineWebber has exhibited throughout this case a curious tendency to wrongly accuse others of the improper conduct in which it is engaging, probably because that offensive tactic usually serves as an effective technique to deflect attention from its own wrongdoing. In this case, there is a reasonable possibility that counsel for PaineWebber employed his firm's public relations-media consultant to stimulate the *Miami Review*'s interest in an article on BankAtlantic's litigation to be distributed on the very day of closing arguments and jury deliberations in this case. As with the link between PaineWebber's counsel and the jury foreman, however, traditional judicial reluctance to become involved in such matters precluded formal discovery on the matter.

advised me that the *Miami Review* was writing a story on BankAtlantic, the PaineWebber trial and the pending Borkson litigation [an action brought by certain minority shareholders against BankAtlantic].

3. During the trial of the above matter we were extremely concerned about the impact of news stories on this case. At the very outset of the trial we requested an instruction to the jury to refrain from reading news stores about the case. BankAtlantic severely curtailed its normal media advertising during this period, delaying the present advertising program for a considerable period beyond its original schedule. As counsel for BankAtlantic Financial Corporation in the Borkson litigation, we attempted to extend the time to plead in response to the plaintiffs' complaint to avoid filing an answer and counterclaim which might create a news story during the PaineWebber trial. Because of the unexpected length of the PaineWebber trial and because Judge Aronovitz denied BankAtlantic Financial Corporation further extensions of time, we were compelled to file responsive pleadings during the last ten days of the PaineWebber trial. We substantially shortened the pleadings that had been originally prepared for filing in the Borkson litigation to eliminate as much newsworthy content as possible.

4. The message from the *Miami Review* reporter indicated that BankAtlantic's efforts at publicity avoidance were going to fail. I returned the call of the *Miami Review* reporter solely for the purpose of urging him to delay his story for several days until the verdict was rendered. I talked to him about the importance of the case to BankAtlantic in a futile attempt to cause him to weigh the benefit of his story to his newspaper versus the potential damage to everyone connected with this lengthy and expensive trial. I begged the reporter to discuss the matter with his editor and publisher and he agreed to do so. Unfortunately, however, I was subsequently advised that

> notwithstanding our plea, the story was going to appear before the jury returned its verdict.

Id. at 3.

As explained in detail in BankAtlantic's cross-petition, the article published by the *Miami Review* was extremely critical of BankAtlantic's chairman, Alan Levan, and of BankAtlantic's relations with Elliot Borkson, a minority shareholder. Cross-Petition at 11-13. The substance of the article echoed and supplemented PaineWebber's attack on Alan Levan at trial and the themes of its closing argument made on the same day that the foreman of the jury read the article. It makes no sense, therefore, to argue that BankAtlantic's counsel encouraged publication of such adverse and prejudicial information as claimed by PaineWebber. Moreover, it was counsel for BankAtlantic who first raised concern about, and who took steps to prevent, jury exposure to newspaper articles during the course of the trial.[3] *Id.*; R44-651-99-100.

3. BANKATLANTIC SUFFERED LOSSES EXCEEDING $30 MILLION THAT WERE CAUSED BY PAINEWEBBER'S BREACHES OF DUTY.

PaineWebber claims that a former chief financial officer of BankAtlantic, Herbert Stangl, who had been asked to resign from that position some time before the trial in

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[3] PaineWebber did not actually file "a motion to sanction BankAtlantic and its counsel for praticipating in such an article during trial" as asserted by PaineWebber at pages 11 and 22 of its brief in opposition. Rather, the motion was to poll the jury to determine if they had seen the article and to have the judge tell them (incorrectly) that counsel for BankAtlantic should not have even talked to the reporter. Although PaineWebber's motion can readily enough be seen as an attempt to call the jury's attention to the article and to emphasize its importance, the motion on its face did nothing more than echo BankAtlantic's previously expressed concern about the jurors reading articles to obtain extraneous information that should not have been considered in their deliberations.

this case, testified that BankAtlantic suffered no loss from the interest rate swaps.[4] Brief in Opposition at 6-7. In fact, however, Stangl's testimony was that no "accounting" loss had occurred because the actual economic losses had been expensed over the life of the swaps in accordance with applicable accounting standards. On cross examination, Stangl clearly stated this:

> Q. What we are talking about here is whether or not from an accounting standpoint you could have avoided having to book that huge loss legally?
>
> A. Yes.
>
> Q. And appropriately?
>
> A. Yes.
>
> . . . .
>
> Q. If, in fact, the swap made no sense on day one as an economic transaction, is the cost to BankAtlantic the total of the checks you wrote to California, sir; is that what it cost BankAtlantic?
>
> A. Yes.
>
> Q. So the critical issue is whether the swaps should have been put on in the first place; is that right?
>
> A. Yes.

R58-73-76.

In short, the "substantial evidence" of no loss to which PaineWebber refers is a gross distortion of testimony about complicated accounting principles and practices. PaineWebber's argument is much the same as the notori-

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[4] PaineWebber also refers to financial statements of BankAtlantic noting that the impact of the swaps was "insignificant." Brief in Opposition at 6-7. The reference, however, is to a financial statement of the bank's *holding* company which had previously shown the *entire* loss in *earlier* financial statements (because it was unable to "expense" the loss over a period of years like the bank itself). For the *holding* company, therefore, the effect of the interest rate swap losses at the time of the financial statements referenced by PaineWebber was insignificant *because the losses had already been booked in the past.*

ous attack by George Smathers against Claude Pepper's sister in the vicious Florida election campaign that cost Pepper his Senate seat: Smathers repeatedly told voters in highly accusatory tones that she was "a known thespian" and had "matriculated at college."

Upon closer examination, the rest of PaineWebber's so-called "substantial evidence" is equally deceptive and flimsy. For example, PaineWebber refers to pretrial deposition testimony by the chairman of Homestead that it had been in business for over 100 years and that "any suggestion that Homestead was not creditworthy was 'ridiculous.'" Brief in Opposition at 8-9. In fact, however, Homestead was seized by federal regulators some time ago because it was insolvent.

When the view is not obscured by PaineWebber's deceptions, by its scurrilous personal attack on Alan Levan,[5] and by its use of a prejudicial newspaper article to influence an already tainted jury, it can be seen that the evidence in this case conclusively proves that BankAtlantic suffered losses exceeding $30 million caused by PaineWebber's breaches of fiduciary duty, fraud, and other breaches of duty.

4. RULE 606(b), FEDERAL RULES OF EVIDENCE, WAS VIOLATED IN THIS CASE.

PaineWebber does not deny that, in contravention of the express provisions of Rule 606(b), Federal Rules of Evidence, the jurors in this case were questioned by the district court about the effect of the newspaper article on their minds and that denial of BankAtlantic's motion for new trial on the ground of juror misconduct was

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[5] PaineWebber states at page 20 of its brief in opposition that "there is nothing in the record which plausibly could be called 'attorney misconduct.'" Even the Eleventh Circuit noted, however, that "some of [PaineWebber's] arguments could be viewed as improper." A-21.

expressly based in part on the jurors' responses to the inquiries about their mental state. Brief in Opposition at 18-20. Instead, PaineWebber argues that the decisions of this Court in *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) and *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954) permit such inquiries.

PaineWebber is in error. *Remmer* was decided in 1954, twenty one years before Rule 606(b) was enacted. *Smith* was a habeas corpus case from a state court decision based upon New York State law, and as the *Smith* Court stated: "A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution." 102 S.Ct. at 948. The Federal Rules of Evidence, including Rule 606(b), have no application in such cases.

Even more fundamentally, neither case considers or discusses the propriety of testimony by jurors about the effect of extraneous information on their mental or emotional state, especially when the jurors' own misconduct is at issue. Nor is any mention made of Rule 606(b) in any manner. If either case has any direct relevance to the present situation, however, it is *Remmer*, which states: "[A]ny private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." 74 S.Ct. at 451.

The issue raised by BankAtlantic in this cross-petition is whether the federal courts will provide litigants who have made a strong *prima facie* case of a "communication, contact, or tampering directly or indirectly with a juror during trial," as in this case, with sufficient tools to be able to adequately prove the misconduct. Merely granting a hearing and asking the jurors a few questions at the hearing is not enough. In light of the increased

sophistication of parties and their counsel in dealing with the media and jurors, there must be an opportunity and an ability to conduct an adequate investigation prior to the hearing.

CONCLUSION

This Court should grant BankAtlantic's cross-petition.

Respectfully submitted,

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